No. 80-420

In The

Supreme Court of the United States

OCTOBER TERM, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners.

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

JOINT APPENDIX

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DOCKET SHEET
OHIO SUPREME COURT

THE SUPREME COURT OF OHIO,
JANUARY TERM, 1979
CASE NO. 79-556

TITLE OF CASE

State of Ohio,
Appellee,

Larry C. Flynt et al.
Appellants.

ACTION

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY.

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Docket Sheet, Ohio Supreme Court

DATE	MEMORANDA OF PLEADINGS, ETC., FILED, WRITS ISSUED ETC., JUDGMENTS, ORDERS AND DECREES
April 30 1979	Notice of Appeal
April 30 1979	Memo of Appellant extended to May 4, 1980 (56-222)
May 2, 1979	Memo of Appellant and Certificate of Service
June 1, 1979	Memo of Appellee and Certificate of Services
Sept 13 1979	Motion to Certify Record, Allowed (56-389)
Sept 13, 1979	Cause Docketed on its Merits
Sept 13, 1979	Order to Certify Record Sent Clerk of Courts
Oct. 12, 1979	Original Papers filed
Oct. 25, 1979	Brief of Appellant extended to Nov. 2, 1979 (56-481)
Nov. 2, 1979	Brief of Appellant filed
Dec. 7, 1979	Brief of Appellee extended to Dec. 12, 1979 (56-539)
Dec. 12, 1979	Brief of Appellee filed
July 16, 1980	Judgment affirmed (57-173)
Aug. 5, 1980	Mandate Issued
Aug. 5, 1980	Certified Copy of Entry sent to Clerk
Sept. 3, 1980	Original Papers returned to Clerk
Dec. 10, 1980	Entry from U.S. Supreme Court—Certiorari Allowed

Docket Sheet, Ohio Supreme Court

CASE No. 79-556 STATE V. FLYNT ET AL.

ENTRY

Thursday, September 13, 1979

State of Ohio,
Appellee,

v.

Larry C. Flynt et al.,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEAL FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is allowed.

Wednesday, July 16, 1980

State of Ohio,
Appellee,

v.

Larry C. Flynt et al.,
Appellants.

APPEAL FROM THE COURT OF APPEAL FOR CUYAHOGA COUNTY

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Cleveland Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga county for entry.

I, Sam F. Adkins, Deputy Clerk, Supreme Court of Ohio, do hereby certify that these documents are true and correct copies of the entries of this court in the above subject case and a true and correct copy of the docket page of this court in subject case.

/s/ SAM F. ADKINS

Dated this 15th day of December, 1980.

(SEAL)

MEMORANDUM TO ATTORNEYS OF JUDGE CALANDRA
Cleveland Municipal Court

STATE OF OHIO

Plaintiff

vs.

JIMMY R. FLYNT
LARRY C. FLYNT
ALTHEA LEASURE FLYNT

Defendants.

Case Nos. 76 CRB 16687 A & B
76 CRB 16688 A & B
76 CRB 16689 A & B

(Judge Salvatore R. Calandra)

MEMORANDUM TO ATTORNEYS

The defendants have filed multiple motions seeking dismissal of the charges. Briefs have been filed and argued during two lengthy hearings.

Several rulings have been made by this Court prior to this date. The Court has ruled that Section 2907.32 of the Ohio Revised Code which defines the crime of pandering obscenity is constitutional. Further, the Court has ruled that the two issues of the magazine are obscene as a matter of law and not entitled to protection under the First Amendment.

The Court directs its attention now to defendants' motion to dismiss on the ground that the complaints represent selective and discriminatory prosecution and therefore violate the equal protection provisions of the Fourteenth Amendment.

The testimony of the Assistant Prosecutor, whose basic duty is the prosecution of obscenity cases, was that guidelines had

been established as to what matters were to be prosecuted; that those guidelines were solely concerned with the hard core pornography; that the only prosecutions to date were for publications violative of these hard core pornography guidelines; that the magazines presented to date were sold solely in "Adult" bookstores; that there were other magazines, available generally throughout the community, which contained some hard core material; that none of these magazines were the subject of any prosecution; that the magazine in question did not contain hard core material and that magazines, similar to the magazines in question, available at the same location and in the same manner as this magazine, had not and were not being presented.

The Court does not take into consideration that this is the first prosecution of this type of magazine or of this type of defendants. However, the Court must take into consideration that not only is this the first but it is also the only such prosecution and that no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case in July of 1976.

While varied essential elements need be present for the successful prosecution of the crime of pandering obscenity, whether it be by a corporation or an individual, the basic issue is the obscenity of the periodical. If it is obscene, then whoever sells, distributes or publishes it is subject to prosecution. If there are, as the evidence clearly indicates, other magazines, similar in content to the magazine in question, then to select and prosecute this magazine and this magazine only, presents a serious constitutional question. It is legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action.

While this Court certainly disagrees with some of the conclusions and interpretations recited by the prosecutor, as to

whom and what to prosecute, for the purposes of this motion this Court is limited by that testimony and must search that testimony objectively in relationship to the constitutional guidelines established by a series of previous judicial decisions on the discriminatory prosecution question.

It is this Court's decision that the testimony supports the allegations of the defendants. The motion will be granted and the charges will be dismissed against these defendants.

/s/ SALVATORE R. CALANDRA

SALVATORE R. CALANDRA, Judge
Cleveland Municipal Court
Courtroom #11, City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
621-6345

JOURNAL ENTRY AND OPINION
Court of Appeals of Ohio, Eighth District
COUNTY OF CUYAHOGA
NO. 38079

STATE OF OHIO

Appellant

vs.

LARRY C. FLYNT, ET AL.

Appellees

DATE FEB 8 1979

APPEAL FROM

CLEVELAND MUNICIPAL COURT
No. 76 CRB 16688, 16687 & 16689

JOURNAL ENTRY AND OPINION

KRENZLER, P.J.:

This cause came to be heard upon the pleading and the transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

On July 14, 1976, complaints were issued against the defendant-appellees Larry C. Flynt, Jimmy R. Flynt, and Althea Leasure in the Cleveland Municipal Court, alleging violations of R.C. 2907.32(A)(2) governing the pandering of obscenity.[1] The complaints alleged that the appellees were

[1] R.C. 2907.32(A) provides in part:

"No person, with knowledge of the character of the material or performance involved, shall do any of the following:

* * *

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material. . . ."

officers, agents, or employees of Hustler Magazine. The offenses charged were based upon the July and August, 1976 issues of that publication.

The appellees moved to dismiss the complaints upon the ground of discriminatory prosecution. Although a copy of the motion is not contained in the record before this court on appeal, a hearing on the motion was held by the trial court on February 28, 1977. On May 17, 1977, the appellees' motion to dismiss was granted, and the appellees were ordered discharged.

The appellant, State of Ohio, is appealing from the trial court's decision granting the appellees' motion, and assigns the following error:

> THE SELECTION OF "HUSTLER" MAGAZINE FOR OBSCENITY PROSECUTION IS NOT AN EXERCISE OF UNCONSTITUTIONAL DISCRIMINATION.

At the hearing below, the principal witness for the appellees was Bruce A. Taylor, Assistant Director of Law with the City of Cleveland and the prosecutor assigned to prosecute obscenity cases. Mr. Taylor testified that he had been on this assignment for two years, ever since becoming an attorney. Since 1973 there had been approximately 500-550 obscenity arrests in Cleveland, and of this total, one-half to two-thirds involved films and the remainder involved magazines.

Mr. Taylor stated that written guidelines had been developed for the police department three to four years earlier to guide them in making arrests for obscenity. He testified that he had never relied on these guidelines, and that police officers were concentrating on "mostly hard-core meaning actually [sic] instead of simulated acts of sex, and where ejaculation, et cetera, is shown." (Tr. 14). He did not know whether the

written guidelines on obscenity arrests were still controlling, and testified that he had never seen them. He had instructed police to concentrate on "more explicit" as opposed to "less explicit" materials.

To Mr. Taylor's knowledge, there had been no prosecution of publications involving only written material. To his knowledge there had been only two prosecutions invoiving materials, such as Hustler, not depicting explicit sexual activity.

Regarding the prosecution of Hustler, Mr. Taylor testified that a copy of the July issue of that magazine had been sent to the Cleveland Police Department, and that several complaints were made regarding a cartoon depicting prominent political figures engaged in sexual activity with the Statue of Liberty. The police officers brought the magazine to Mr. Taylor, who examined its overall content. He stated that while the cartoon was "one of the reasons they were prosecuted" it was not "one of the reasons they were charged." He also stated that in his opinion the magazines were legally obscene.

He also stated that the city had never prosecuted a magazine like Hustler, and that this was the first prosecution of a magazine having a second-class mailing privilege and nationwide distribution. A number of "men's magazines" had been under investigation for eight monhs, but no prosecutions had been initiated.

At this point in the hearing, the following dialogue took place:

> Q. All right. And is that unusual to have a magazine under investigation for eight months without initiating an investigation, in your experience here as a prosecutor?
>
> A. Well, it's unusual — this is the first time it has happened because we're waiting for this case.
>
> Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud —

A. I don't know. That decision, I can't make alone either.

Q. But I take it it's been contemplated?

A. It's being discussed. (Tr. 92)

Mr. Taylor stated that the other men's magazines referred to by appellees' counsel were comparable to Hustler.

Officer Steven Nemeckay of the Cleveland Police Department Obscenity Detail testified that he had purchased the two issues of Hustler upon which the prosecution was based at the instruction of Mr. Taylor. The issues were taken to several judges, and their determination regarding its contents led to the filing of the complaints.

Subsequently, the order of dismissal based on discriminatory prosecution was entered, and the state brought this appeal.

The question presented by this appeal is whether the appellees made a proper showing of discriminatory prosecution so as to entitle them to discharge.

It is well settled that upon a proper showing of discriminatory prosecution a criminal defendant is entitled to discharge. The principle of law underlying such a discharge is that although a statute or ordinance may be fair and impartial on its face, the equal protection clause of the Fourteenth Amendment prohibits the application and administration of such laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights." *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-74. In *Yick Wo v. Hopkins, supra*, the Supreme Court overturned the petitioners' convictions on the ground that the prosecution against them were based solely on their race and nationality.

Where a claim of discriminatory prosecution is considered, the standard to be followed is whether the selection of the defendant for prosecution "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles* (1962), 368 U.S. 448; *State v. Wolery* (1976), 46 Ohio St. 2d 316, *cert. denied* 429 U.S. 932. *See also State v. Steurer* (1973), 37 Ohio App. 2d 51; Annot., 4 A.L.R. 3d 404.

In a leading case in this area of the law, it was stated that the question to be answered is "whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or for some other illegitimate reason. The wrong to be prevented is a wrong by the public authorities." *People v. Utica Daw's Drug Co.* (1962), 16 App. Div. 2d 12, 17-18.

While the doctrine of discriminatory prosecution is well established, it should not be equated with mere selectivity in prosecution, without a concomitant showing of deliberate discrimination based on an unjustifiable standard. Taken alone, the conscious exercise of some selectivity in enforcement is not a federal constitutional violation. *Oyler v. Boles, supra* at 456. *See State v. Wolery, supra.* Accordingly, the Ohio Supreme Court has noted the "discretion vested in a public prosecutor to exercise selectivity in the enforcement of criminal statutes." *State v. Wolery, supra* at 325. The burden of proving conscious, intentional discrimination is upon the defendant and is a heavy one. *People v. Utica Daw's Drug Co.*, supra at 19.

The bounds of prosecutorial discretion to selectively prosecute offenders was examined at some length in *People v. Utica Daw's Drug Co., supra.* In that case, the court pointed

out that such selectivity may be justified where "the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity." *Id.* at 21. Such a method of prosecution "may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary." *Id.* It is clear that the prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, or an attempt to make an example, where the evidence clearly demonstrates to the contrary that a discriminatory intent is present. Nevertheless, "[i]t is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found." *Id.*

Applying the above principles to the instant case, it is clear that the appellees demonstrated that other "men's magazines" with a format similar to Hustler were not yet being prosecuted. It was also shown that such magazines were being sold in the same sort of stores as Hustler, and that the authorities were aware of their existence and general content.

At the same time, the prosecutor who testified at trial stated that the prosecution of Hustler was a test case. Although the magazine was brought to the attention of public authorities in part because of an offensive cartoon, the prosecutor provided several reasons why Hustler was chosen for a test case. First, he maintained that while it contained essentially the same format as other magazines, some portions were more offensive than those in similar magazines. Second, he stated that to his knowledge, prosecution of officers of out-of-state magazines would at the least entail greater difficulties of service of process

and extradition. The officers of Hustler, on the other hand, were domiciled in Ohio.

Also, taking the testimony from the hearing below in context, the testimony of Mr. Taylor, an assistant Director of Law, was not sufficient to meet the appellees' burden of proof as to intentional discrimination. In particular, he stated that he was not in a position to make the decision of whether the other "men's magazines" under investigation would be prosecuted if the Hustler prosecution were successful.

> Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud —
>
> A. I don't know. That decision, I can't make alone either. (Tr. 92)

If Mr. Taylor had stated that he was in a position to decide whether to prosecute the other publications, his testimony that they had not yet been prosecuted would perhaps be some evidence of discriminatory intent. Absent testimony from his superiors, however, there was no reliable basis upon which the trial court could infer that the City of Cleveland would not follow up a successful result in the Hustler case with additional prosecutions. Taking the testimony of Mr. Taylor alone, on the other hand, the court had before it no substantial evidence to support a conclusion that Hustler alone would be prosecuted, much less that this selectivity was based on constitutionally prohibited discrimination. Accordingly, in order to sustain their burden, the appellees should have at least presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format. Such testimony might have provided a reliable basis for a conclusion that discriminatory intent was indeed present. Absent such testimony, we must conclude that the appellees did

not present evidence of such quality to sustain their burden of proof as to the intent underlying the decision to prosecute Hustler.

Our conclusion should be viewed in light of the fact that the burden of proving conscious discriminatory intent is upon the defendant and is a heavy one. *People v. Utica Daw's Drug Co., supra*. Also, as discussed earlier, selectivity in prosecution alone is not sufficient to demonstrate a constitutional violation absent a showing that the prosecution is based on an unjustifiable standard or arbitrary classification. *See, e.g. Oyler v. Boles, supra*.

Examination of the transcript of testimony from the hearing below fails to reveal that the Hustler prosecution was based on any deliberate discrimination involving an arbitrary classification. The selection of Hustler for a test case, in fact, was based on several rational factors differentiating it from magazines of the same format. Accordingly, we hold that the court below erred in dismissing the case based on the doctrine of discriminatory prosecution, and that the appellant's assignment of error is well taken.

The order of the trial court granting the appellees' motion to dismiss is reversed and the case remanded for further proceedings.

Journal Entry and Opinion
Court of Appeals of Ohio, Eighth District

RECEIVED FOR FILING
FEB - 8 1979
GERALD E. FUERST
Dep.
/s/ PEGGY MAGUET

This cause is remanded to the Cleveland Municipal Court for further proceedings.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PRYATEL, J.,
PATTON, J., CONCUR

/s/ ALVIN I. KRENZLER
PRESIDING JUDGE
ALVIN I. KRENZLER

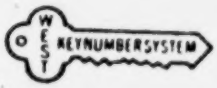
Appearances:

For Plaintiff-Appellant: Almeta A. Johnson

For Defendant-Appellees: Bernard A. Berkman

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

OHIO SUPREME COURT DECISION, STATE v. FLYNT
63 Ohio St.2d 132, 407 N.E.2d 15



63 Ohio St.2d 132

The STATE of Ohio, Appellee,

v.

FLYNT et al., Appellants.

No. 79-556.

Supreme Court of Ohio.

July 16, 1980.

Defendants charged with obscenity offenses moved to dismiss the complaint on the basis that they were discriminatorily prosecuted. The trial court dismissed the charges, but the Court of Appeals for Cuyahoga County reversed. Defendants appealed. The Supreme Court held that the defendants did not sustain their burden of establishing a prima facie case of unconstitutional discriminatory prosecution, but in order to sustain their burden, the defendants had to present testimony from individuals responsible for deciding the intended course of future obscenity prosecutions.

Affirmed.

Paul W. Brown, J., filed a dissenting opinion.

1. Criminal Law Key 31

Conscious exercise of some selectivity in enforcement is not in itself a violation of the Constitution, but in order for selective enforcement to reach level of unconstitutional discrimination, discrimination must be intentional or purposeful. U.S.C.A. Const. Amend. 14.

Ohio Supreme Court Decision, State v. Flynt,
63 Ohio St.2d 132, 407 N.E.2d 15

2. Criminal Law Key 330

Burden on defendant to show intentional or purposeful discriminatory prosecution is a heavy one and will not be presumed. U.S.C.A. Const. Amend. 14.

3. Criminal Law Key 569

Defendants charged with obscenity offenses did not sustain burden of establishing prima facie case of unconstitutional discriminatory prosecution, but in order to sustain their burden, defendants had to present testimony from individuals responsible for deciding intended course of future obscenity prosecutions. U.S.C.A. Const. Amend. 14.

On July 14, 1976, complaints were issued against defendants-appellants, Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt, for allegedly pandering obscenity in violation of R.C. 2907.32(A)(2), complicity in violation of R.C. 2923.03(A)(2) and personal accountability for organizational conduct in violation of R.C. 2901.24(A)(1). The complaints alleged that the defendants, as officers, agents or employees of Hustler magazine, caused, or permitted, the exhibition or dissemination of materials known to be obscene, to wit, the July and August, 1976, issues of Hustler magazine.

The defendants moved to dismiss the complaints on the basis that they were discriminately prosecuted, in contravention of the Equal Protection Clause of the Fourteenth Amendment. The trial court granted an evidentiary hearing on the motion, whereupon the following facts were elicited, primarily from Bruce A. Taylor, the assistant law director for the city of Cleveland. Taylor had been in charge of the city's obscenity prosecution when these complaints were issued.

It was testified that since April of 1973 the city of Cleveland had initiated between 500 and 550 obscenity prosecutions. The

materials selected for prosecution were largely determined in accordance with instructions given by Taylor to police officers, although the officers were given considerable latitude to exercise their own discretion. The instructions provided that applicable Supreme Court decisions proscribed the sale of "obscenity which is hard-core." "Hard-core" was understood to encompass "actually instead of simulated acts of sex." The officers were further instructed to seize the "most explicit of the material available." Enforcement therefore concentrated on "adult book-stores and theaters." There was also testimony that certain materials which may not have contained "actual sexual contact" were, nevertheless, seized and prosecuted. It was conceded by Taylor, that "[w]e had never prosecuted a magazine like Hustler."

Further testimony revealed that the police department received complaints about the July 1976 issue of Hustler, and, in particular, a cartoon depicting sexual activity between prominent political figures and the Statue of Liberty. An investigation ensued, whereupon a copy of the issue was brought to Taylor, who subsequently decided to initiate action against the magazine.

Taylor asserted that Hustler was prosecuted as a test case. Other magazines of a similar nature had been under investigation for eight months without being prosecuted. He conceded that such an extended investigation was unusual. When questioned why he did not prosecute these magazines, Taylor stated that he was "waiting for this case." When he was asked whether further prosecutions would follow, should he receive a favorable decision in this case, Taylor responded, "I don't know. That decision I can't make alone either" but "[i]t's being discussed."

On the basis of this testimony and the testimony of a Cleveland police officer working obscenity cases, the trial judge

determined that the defendants were prosecuted discriminatorily, in violation of the Fourteenth Amendment, and dismissed the complaints. The Court of Appeals reversed, holding that the defendants failed to sustain their burden of proof.

The cause is now before this court upon the allowance of appellants' motion to certify the record.

Almeta Johnson, Chief Police Prosecutor, and Bruce A. Taylor, Cleveland, for appellee.

Berkman, Gordon, Kancelbaum, Levy & Murray, Bernard A. Barkman, George W. Palda, Cleveland, Herald Price Fahringer and Paul J. Cambria, Jr., New York City, for appellants.

PER CURIAM.

The law is well settled that the government is subject to constitutional restraints in its choice of those whom it may prosecute. As long ago as *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1073, 30 L.Ed. 220, the United States Supreme Court stated that although a "law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights," there is a denial of equal protection of the laws.

[1] The conscious exercise of some selectivity in enforcement is not in itself, however, a violation of the United States Constitution. *Oyler v. Boles* (1962), 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446. In order for selective enforcement to reach the level of unconstitutional discrimination the discrimination must be "intentional or purposeful." *Snowden v. Hughes*

(1944), 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497. This concept of "intentional or purposeful discrimination" was explained in *United States v. Berrios* (C.A.2, 1974), 501 F.2d 1207, 1211, as follows:

"To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.' " This test has been recognized by numerous courts. See *United States v. Murdock* (C.A.5, 1977), 548 F.2d 599, 600; *United States v. Ojala* (C.A.8, 1976), 544 F.2d 940, 943; *United States v. Legget & Platt, Inc.* (C.A.6, 1976), 542 F.2d 655, 658, certiorari denied, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977); *United States v. Bourque* (C.A.1., 1976), 541 F.2d 290, 292—293; *United States v. Peskin* (C.A.7, 1975), 527 F.2d 71, 86, certiorari denied, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 79 (1976); *United States v. Scott* (C.A.9, 1975), 521 F.2d 1188, 1195, certiorari denied, 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976).

Applying these principles to the instant cause it must be conceded that defendants demonstrated that other magazines with a format similar to Hustler, sold in the same stores as that magazine, were not yet being prosecuted, although the authorities were aware of their existence and general content. There are, however, several legitimate reasons testified to at

trial as to why Hustler magazine was chosen as a test case.[1] The prosecutor, for example, testified that while it contained a similar format as other magazines on the market, that some portions of Hustler were more offensive than those in the compared magazines. It was also testified that the prosecution of out-of-state magazines would entail greater difficulties in service of process and extradition. The officers of Hustler, on the other hand, were domiciled in Ohio.

In addition, the defendants did not establish that Hustler alone would be prosecuted. The prosecutor in this cause stated that he did not have the authority to make the decision concerning subsequent prosecutions of other magazines. Testimony from his superiors was necessary to infer that the city of Cleveland would not follow up a successful result in the instant cause with the bringing of additional prosecutions.

[2, 3,] The burden on a defendant to show intentional or purposeful discrimination is a heavy one, *Berrios, supra*, and will not be presumed, *Snowden, supra*. We hold that the defendants herein did not sustain their burden of establishing a

---

[1]The validity of pursuing a test case and its relationship to the doctrine of discriminatory prosecution was explored in the case of *People v. Utica Daw's Drug Co.* (1962), 16 A.D.2d 12, 225 N.Y.S.2d 128, 136, where it was stated:

> "Selective e cement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found."

prima facie case of unconstitutional discriminatory prosecution. In order to sustain their burden, the defendants needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions.

Accordingly, the judgment of the Court of Appeals is affirmed.[2]

Judgment affirmed.

CELEBREZZE, C. J., and HERBERT, WILLIAM B. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

PAUL W. BROWN, Justice, dissenting.

I agree with the test used by the majority and I also agree that there is a heavy burden upon the defendants to demonstrate intentional or purposeful discrimination. I would hold, however, that the defendants sustained this burden and that the Court of Appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact in the instant cause.

It is well-settled that in reviewing a decision rendered by a trial court without a jury, a Court of Appeals will indulge in every reasonable presumption in favor of findings made by the court below as a basis for its decision. *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42. Any fact necessary to sustain the judgment, including reasonable inferences drawn therefrom, must be presumed to have been found by the trial court if evidence was presented in support of such finding. See *Brescoll v. Nationwide Mut. Ins. Co.* (1961), 116 Ohio App. 537, 543, 189 N.E.2d 173; *Thayer v. Shorey* (1934), 287 Mass.

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[2]Implicit in this court's holding is a rejection of defendants' contention that the Court of Appeals reversed the trial court's dismissal of the complaints in the instant cause, based upon an improper determination of the credibility of the witnesses at trial.

76, 191 N.E. 435. The appellate courts in the instant cause have deviated from this principle.

Applying the test used by the majority, governing discriminatory prosecutions, quoted from *United States v. Berrios* (C.A.2, 1974), 501 F.2d 1207, 1211, it is apparent that the first prong of that test is met. The defendants presented evidence, the witness Taylor conceded, and the trial court found,[1] that the city of Cleveland had never before prosecuted a magazine like Hustler, despite the fact that magazines similar to or pictorially "stronger" than Hustler were available within the community. Although Taylor justified this as a test case, there was substantial evidence indicating the contrary. Lengthy investigations of similar magazines were dropped without taking even preliminary steps toward prosecution. Taylor's attempted justification, *i.e.*, that he was awaiting the outcome of this case, was contradicted by his subsequent testimony concerning the likelihood of general enforcement in the future if he received a favorable judgment in the case. When asked whether he would then pursue other magazines of this type, Taylor testified that the decision was subject to approval from his superiors—this, despite the fact that by his own admission, Taylor possessed the exclusive delegated authority to select which cases to prosecute and he alone had made the decision to pursue Hustler. Furthermore, the evidence strongly indicated that this prosecution was initiated, not to clarify the status of obscenity laws, but rather in response to public reaction to political cartoons.

In light of the trial court's express rejection of the test case rationale, the majority, by selectively adopting testimony

[1]There are no findings of fact or conclusions of law in the record. There is, however, a document entitled "Memorandum to Attorneys," authorized by the trial judge, indicating some of the factual considerations supporting his decision. Any reference to the trial court's "findings" are derived from this document.

supportive of finding this prosecution to be a test case and rejecting evidence to the contrary, improperly impinged on the trial court's prerogative as trier of fact to weigh the evidence and evaluate the credibility of the witnesses. A prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, where the evidence clearly demonstrates that to the contrary a discriminatory intent is present.

As to the second prong of the *Barrios* test, *i.e.*, that the discriminatory selection is invidious or in bad faith if based upon impermissible considerations, substantial evidence was presented to establish that the prosecution was initiated (1) on the basis of public sentiment and (2) for the purpose of inhibiting First Amendment rights. Either motivation, standing alone, would be a sufficient basis for a finding of invidious selection or bad faith.

Taylor explained that he would need to consult his superiors concerning future prosecutions of magazines similar to Hustler because of publicity surrounding obscenity prosecutions. Taylor stated that public reaction was a legitimate consideration in obscenity cases because strong public interest impeded the speedy disposition of these cases and because public response was a barometer of the community's perception of obscenity. The trial court properly took exception to these proffered justifications as a basis for selecting cases to prosecute. The judge noted that the progress of a trial is not a function of attendant publicity, nor should public reaction be used as an index to the community's ideas as to what constitutes obscenity; such a determination being within the domain of a jury. A reasonable inference to be drawn from this testimony, and one which the trial court apparently drew,[2] is that the defendants

[2]The court asked witness Taylor:

> "Mr. Taylor, are you sitting here telling this court that if someone makes a determination that there is a violation of the criminal section of the statute, or the city of Cleveland, that you first determine what the public feels about it before you proceed * * *?"

were prosecuted on the basis of unfavorable public sentiment. Upon this evidence the trial court could reasonably have found that this prosecution was initiated in "bad faith," *i.e.*, that it was grounded upon an arbitrary standard to pursue only those whom the public held in disfavor. As the court noted in *United States v. Torquato* (C.A.3, 1979), 602 F.2d 564, 568:

"* * * To permit criminal prosecutions to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias." It is our obligation to prevent such personal abuses of governmental power.

There are also indications that the prosecution was brought to chill the defendants' First Amendment rights. There was strong evidence that the prosecution was initiated on the basis of the political cartoon depicting sexual activity between political figures and the Statue of Liberty (as well as the cartoon displaying Uncle Sam with his pants down). This was admitted during the course of a television interview and at the hearing, although Taylor subsequently attempted to retract and qualify these statements. Taylor conceded that the cartoon was "the most protected thing in the whole magazine." He could hardly argue otherwise, in light of *Papish v. Univ. of Missouri Curators* (1973), 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618, wherein the United States Supreme Court held that a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice was not constitutionally obscene. This testimony alone served as an independent basis for the trial court to find bad faith through the inhibition of First Amendment rights.

I conclude that having made a proper showing of discriminatory prosecution, the defendants are entitled to discharge. Such a determination in no way reflects upon the

guilt or innocence of the defendants.[3] If, and when, the public authorities decided to undertake a generalized enforcement of the law, the defendants could again be charged.

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[3]"The question is * * * whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or some other illegitimate reason. The wrong sought to be prevented is a wrong by the public authorities. To allow such arbitrary and discriminatory enforcement of a generally disregarded law is to place in the hands of the police and the prosecutor a power of the type frequently invoked in countries ruled by a dictator but wholly out of harmony with the principle of equal justice under law prevailing in democratic societies. The court is asked to stop the prosecution at the threshold, not because the defendant is innocent but because the public authorities are guilty of a wrong in engaging in a course of conduct designed to discriminate unconstitutionally against the defendant." *People v. Utica Daw's Drug Co.* (1962), 16 A.D.2d 12, 21, 225 N.Y.S.2d 128, 133.

TRANSCRIPT OF PROCEEDINGS

THE STATE OF OHIO,)
COUNTY OF CUYAHOGA,) SS: CALANDRA, J.
CITY OF CLEVELAND.)

IN THE CLEVELAND MUNICIPAL COURT

STATE OF OHIO,

Plaintiff,

vs.

JIMMY R. FLYNT, and
LARRY C. FLYNT, and
ALTHEA LEASURE FLYNT,

Defendants.

Case Numbers:
76 CRB 16687A, 76 CRB 16687B
76 CRB 16688A, 76 CRB 16688B
76 CRB 16689A, 76 CRB 16689B

FEBRUARY 28, 1977

APPEARANCES:

On behalf of the Plaintiff:
Bruce A. Taylor, Esq.,
Assistant Law Director.

On behalf of the Defendants:
Lipsitz, Green, Fahringer, Roll,
Schuller & James, by
Herald Price Fahringer, Esq., and
Paul J. Cambria, Jr., Esq.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that at the January, A.D. 1977 term of said Court, to wit, on Monday, the 28th day of February, 1977, this cause came on to be heard before the Honorable Salvatore R. Calandra, one of the Judges of said Court in courtroom number eleven.

PRELIMINARY REMARKS

PROCEEDINGS

THE COURT: Just as a matter of summary, Mr. Fahringer, I believe that we had discussed most of the motions which were presented by the defendants; and we were at the position where probably the bill of particulars, at that time, had not been fully—

MR. FAHRINGER: Yes.

THE COURT: —presented. Is that true?

We had not explored as of yet the question of separate trials, nor the question of discriminatory prosecution—

MR. FAHRINGER: Your Honor, we've got the — we're happy to report to you that we got a bill of particulars, and my understanding was that, if it please Your Honor, today what we would do is take some testimony on the claim of discriminatory prosecution or selective enforcement.

THE COURT: If possible, I would like to conclude today, if possible, the various motions you have before us.

MR. FAHRINGER: That's our ambition, too, Judge.

THE COURT: All right. Fine.

MR. FAHRINGER: Your Honor, you might be — to conserve the court's time, I just spoke to Mr. Taylor.

In view of the fact he has, as I understand it, Your Honor, and we'll try to develop this more fully in trial, been the lawyer who has been responsible for a number of these prosecutions. I thought it might save some time if we started with him, and I explained that to him. I know he testified in one of the other proceedings in this fashion. So I wonder if we could call him, and start with him.

It might save time because I might indicate that it might obviate the calling of all the police officers at least—

THE COURT: Fine. Anything that, Mr. Fahringer, accomplishes the purpose that we're here for.

MR. FAHRINGER: Your Honor, would you entertain a motion, in view of the fact that the other police officers might be called, that we have a sequestration of witnesses?

THE COURT: All those police officers who might be called with the exception of who, Bruce, would be your one person; that would be the sergeant or somebody else—

MR. TAYLOR: Yes. I'll keep—

THE COURT: Then all the other police officers—

MR. TAYLOR: Not testifying—

THE COURT: —with the exception of who might testify—

MR. FAHRINGER: I take it that Officer McNamara doesn't know anything about this case?

MR. TAYLOR: He does know something about it. I don't imagine he will be testifying.

THE COURT: Well, if he stays in here, he can't testify.

MR. TAYLOR: He was with this officer when they went to the George Klein News.

MR. FAHRINGER: Would it bother you, Bruce, if we had them all excluded—

THE COURT: Mr. Taylor, why don't you just put everybody out in the corridor, all right?

MR. FAHRINGER: What about—

MR. TAYLOR: He had nothing to do with it as far as being a police officer—

MR. FAHRINGER: All right.

BRUCE A. TAYLOR BY MR. FAHRINGER

BRUCE A. TAYLOR, of lawful age, having been first duly sworn, was examined and testified as follows:

EXAMINATION OF BRUCE A. TAYLOR

BY MR. FAHRINGER:

Q. Mr. Taylor, would you identify yourself, please?

A. Yes. Bruce A. Taylor. I'm the Assistant Director of Law with the City of Cleveland, and formerly Assistant Prosecuting Attorney for the Office of the Prosecutor.

Presently the prosecutor assigned to prosecute obscenity cases.

Q. How long have you been with the agency you are now working with?

A. I'm presently with the Law Department, as of last Tuesday. I'm still assigned to obscenity prosecutions which I have been, exclusively, in my jurisdiction for the past two years in the prosecutor's office.

Q. And that's what I was really searching for.

How much time have you spent either working obscenity cases or in a supervisory capacity, as far as the obscenity prosecutions in the City are concerned?

A. I came to the office of the Cleveland prosecutor four and a half years ago, and approximately four years ago I began as a law student working with the prosecutors who did obscenities.

Two years ago, when I became a lawyer, I took over the job of handling all the prosecutions for the City of Cleveland, and I handled all the trials of pretrial memorandums almost exclusively for the past two years.

Q. All right. Fine. That's what I was looking to establish.

Now, can you give us, roughly, or precisely, if you can, during that period of time you just described to us, how many obscenity prosecutions have been launched by the City?

A. Okay. If you excuse me, I will—

Now, since April 1973, when the Mayor's police unit on obscenity was formed just to investigate obscenity, they made, roughly 500 — 550 arrests.

We have specific statistics for 1974-'75 combined, and separately for 1976.

In '74 and '75, there were 225 arrests. Sixteen of which are still pending, 49 were dismissed, 136 were pleas of guilty, 12 were acquittals at trial, eight found guilty at trial and five were reversed on appeal.

For the year 1976, there were 158 arrests—

Q. Would you take them slowly; I was just trying to record—

A. 1976, 158 arrests. Thirty-two dismissed by the court, 17 nolled by the prosecution, 29 pleas of guilty, 15 found guilty at trial and 65 pending, roughly—

Q. Beg your pardon?

A. There are roughly 65 pending as far as we—

Q. That are still—

A. Still active.

Q. All right. Now, during this period of time when arrests were being made, and incidentally, I might ask you do you make any distinction at all between an arrest and a prosecution; are there any instances when an arrest is made and a judgment is then made not to prosecute, so that those figures might be more meaningful to us?

A. As far as I know, I have no knowledge of any arrests made by the police which did not result in a prosecution at least being filed.

Q. I take it that the procedure normally is, when the arrest is made, it is based on the complaint that has been formalized and probably signed by a Judge?

A. That's correct as to magazines.

As to films, there is a search warrant which is signed by a judge, and the arrest is made at the time the search warrant is executed.

Q. I wonder if it wouldn't take too much time if you could just tell us more formally what is the procedure in initiating a charge with a magazine through the court?

A. With a magazine, the officers go to an establishment and pick something out which they feel is evidence and attempt to purchase it if possible.

If they can purchase, they buy it and leave the store not making any arrests.

They come back to their office and type up a complaint which has a place for a judge to sign; and then they ask a judge to sign the complaint as to whether the material is obscene for probable cause purposes. Once the judge does that, they have a prosecutor sign it, and the Clerk issues the warrant; and they go back and find the person they bought it from and arrest him.

If they can buy the magazine — and we had one case where they didn't buy the magazine, and they made a description of it; and in some cases where they were given a copy from someone else and had a search warrant made out describing that magazine—

Q. And seize it—

A. Seize it with a search warrant.

Q. What is the procedure with motion pictures?

A. With motion pictures, the officer goes to the book store, which most of these films are 25 cent peep show, eight millimeter variety; or, if he goes to a regular theater, he views the film and goes back to the office and makes out an affidavit for a search warrant which describes the contents of the film. After making out the affidavit for a search warrant, he presents

it to a judge. If the judge issues a search warrant, they go out to the premises, and if they can find the film, they seize it and effect the arrest of the defendant at the time.

Q. Now, do you have any statistics, Mr. Taylor, in terms of your prosecution, as to how many involved magazines or written material or photographic material, and how many involved films?

A. I don't have any specific statistics on it. The officers might be able to make a better guess. I don't think they ever compiled a number like they did for arrests in cases; but, prior to 1976, they were mostly maybe two-thirds films, and one-third magazines.

In 1976, they seemed to have about half and half—

Q. All right. Now, did you establish, during this period of time, written guidelines that were developed by your office to be used in one guiding prosecutions, and guiding arrests?

A. There had been guidelines drawn up and given to the police department at least, probably, three or four years ago. Before I was involved with it—

THE COURT: Just one second.

(Discussion had off the record.)

BY MR. FAHRINGER:

Q. Thank you.

I'm sorry, we interrupted you, Mr. Taylor.

A. That's okay.

Those guidelines, apparently, are referred to by the police. I have never relied on them. I instruct the police to, you know, use their discretion just based on the law. Since the Supreme Court mentions, in the Miller case and in the Paris art case, that it shall now be prohibited to protect or to sell obscenity which is hard-core. I defined to them what I thought hard-core meant.

Bruce A. Taylor by Mr. Fahringer

Now, naturally, they have been concentrating, mostly, on what we call adult bookstores and theaters which contain usually what we call "mostly hard-core" meaning actually instead of simulated acts of sex, and where ejaculation, et cetera, is shown, that is what we have been concentrating on. It has been in our minds easier to prosecute.

Q. May I ask you this: To go back to the written guidelines. Are the written guidelines still in existence?

A. They're still in existence, I imagine. Whether they are controlling or not, I don't really think so.

I have never required them of the police. They are mentioned in our search warrants as obscene per our guidelines, but they don't tell the police which things to take and which things not to take.

Q. Could you describe those guidelines; is it put out in booklet form? Is it just written memorandum, and how many pages?

Could you tell us something about it?

A. Frankly, no. I never — I don't have a copy of the guidelines. The officers could probably tell you what they are.

I have never used them. I've never seen them as a matter of fact.

When I came in, I told them what I thought they should do, and basically I told them to use their own discretion and find what you think is more explicit, if possible; and we'll just ride on my determination and judgment.

Q. But you have never seen these written guidelines?

A. Never.

Q. Oh, I see.

Let me ask you then about your guidelines when you took over and began guiding the prosecution.

What were the guidelines that you fixed?

Bruce A. Taylor by Mr. Fahringer

A. Okay. I told them that for most purposes find, if you go into the premises, and you're going to seize or buy something, find whatever you think is most explicit of the material available. They had been doing this.

Basically, those had been — my guidelines had been as vague as that. To use their discretion to find, you know, whatever is more explicit against that which is less explicit.

Q. What did you mean by "explicit"? We ought to have that on the record.

A. Explicit meaning actual photographs of penetration where it is clearly shown and not just in position.

Q. For instance, and you are talking about — I know this requires some delicate language. Like when the penis is inserted in the vagina would be when you're talking about penetration—

A. Yes.

Q. —that's what you're talking about. Sexual — if it were cunnilingus or fellatio you would want actual contact. The penis in the mouth or vice versa?

A. If possible, that's true; and by "explicit," the more close up the view — maybe, sometimes the more bizarre the subject matter, animals with them or beasts—

Q. Bestiality?

A. Bestiality, and masochism, bondage and sadomasochism. That type of thing.

A. Now, if there were pictures in terms of some of these — what sometimes is referred to as deviant sexual activity.

If it involved sadomasochism. If there were people just dressed up in uniforms or leather clothes or what-not and there was no activity, would that fall within — would you give them any further specifications on that sort of—

A. They have never brought in anything having to do with

bondage or discipline that didn't have actual sexual conduct clearly shown. That was because, at the time, that was all that was available so they seized the others—

Q. Now, in terms of going back to the sex what I referred to as the heterosexual conduct.

In that category, did you, at anytime, make a judgment in your office that as far as just books are concerned — that is to say the printed word, stories about sex, that describe sex, that they would not be prosecuted?

A. No. As far as I know, the police have never seized, and we have never prosecuted a case that was just words.

We never — just like a book like the Tropic of Cancer, unillustrated, et cetera. Although, the police have never been told not to, there have been a few times I have told them that if you couldn't buy a magazine, or they spotted you as a police officer and you didn't think they would sell you one regular type of magazine, or let you in to see a film, they might sell you one of the other books because they think you don't prosecute those. I told them a couple of times that if you have the opportunity, and that's the only thing you can pick up, if you want to take that—

Q. Could I ask you, and I don't mean to pressure you, Mr. Taylor. You talked about five hundred and some arrests or prosecutions in one of these periods. I don't have the figure committed to memory—

A. Since April '73.

Q. Since April '73.

You have had no, as I understand it, you have had no prosecution of any just paperback book or unillustrated book that dealt only with words. Is there any explanation other than the one you can give us for that; I take it there was some kind of custom that was told to the police that they weren't going to prosecute these books?

Bruce A. Taylor by Mr. Fahringer

A. They had been — I don't know what decisions the prosecutor before me made. For the past two years, my chief prosecutor has pretty much left it to my discretion, and I pretty much have left it up to the police to bring the evidence to me.

I'm not sure if I had any books before—

Q. Yes.

A. —they had several different kinds of cases before two years ago when I took over that we don't do anymore.

Q. Like what kind?

A. The chief prosecutor used to take part and go in to view things, and I don't. They went after Deep Throat as a movie, and tried civil injunctions and several things. We don't do as much as — we concentrate more or less on criminal action.

So I'm not sure if he had books or not. I couldn't — I'm not sure.

Q. But under your regime, you haven't prosecuted any paperback books at all?

A. None.

Q. Is there a reason for that?

A. None except as far as what type of material is more available in the adult bookstores. There is so much available which has, you know, very explicit photographs in them. We thought those would be much easier to present to a jury. That is visual stimuli rather than the written word.

Q. I assume — I know you are using the common vernacular here, but I assume your judgment somewhere along the line is based upon the law and your own feelings and judgments as to probability of success in prosecution. That's what you are saying, isn't it?

A. Right.

Bruce A. Taylor by Mr. Fahringer

Q. I take it that the procedure is when the officers go out exercising their discretion and purchase something, they bring it back to show it to you, don't they?

A. Well, not always. They buy it and bring it back. They'll describe it to me. Several times they have had the magazine with them. If you look at the cover, and a few pages, you can decide that this is one of the kinds we will do.

I don't routinely see the movies because they are described in the search warrant. I read the description which is really all the judges see too. So I very seldom see—

Q. Would you say in the case of the books, the magazines, that you see the majority of those?

A. I see the majority of them; although, as far as issuing warrants on magazines, the police officer brings those, you know, the completed complaint signed by the judge to the prosecutor's office; and most of the time I'm not there. Any prosecutor signs them. I'm not the only prosecutor that determines probable cause. After they get issued, then I take the case.

Q. I see. Let me ask you this: I take it that there is a class of case where they bring the material to you and say, "We bought this at such and such a bookstore," or "We think it meets the guidelines and ought to be prosecuted"; and they show it to you.

Does that happen?

A. Yes, that happens.

Now, most of the time, as a matter of routine, they'll come up with one of these books that are pretty much the same as all the rest of the books. On the cover, you know, there is an explicit or crass title where, you know, it's kind of vague, "bust and broad," or "orgasm" or "encyclopedia of deviant sex." They're pretty much the same. So when I see one of those magazines

that we have had contact with in the past, I issue the warrant. We don't actually go through—

Q. Page by page. All right.

Are there some magazines that you do go through page by page; is there another category you may have to examine a little more deeply?

A. There were — we had one magazine, or one set of magazines, that did not show any actual sexual contact, and didn't have any intercourse. That magazine we had to take a harder look at than most because of that fact. It merely had pictures of nude children, and since it didn't have any sexual activity — only in one instance, one of the magazines — we had two magazines. One magazine had one instance where the little girl had her finger on her genitals, but that one time, we had to look through the magazine to make a determination, and we did prosecute on that magazine.

Q. Well, what was the outcome of this prosecution?

A. We — none of those went to trial. They — as soon as we made the arrests, we made arrests in several different stores; and at the same time, we issued search warrants for the magazines. They took them all out of Cleveland, all of the adult bookstores; and this magazine disappeared. As far as the children in them, we dismissed all the prosecutions before they really got started.

Q. I see. All right. Can I ask you this, because I am interested in the guidelines. I think that goes to the heart of the hearing.

In terms of guidelines, have you ever examined — you mentioned as an example "encyclopedia of deviant sex."

In your guidelines, do you ever concern yourself with the articles or the stories or if it really is an "encyclopedia of deviant

sex"; and, if it is medically oriented or if it contains or has, what we used to call, redeeming social values?

A. Several of the magazines have commentary to go with them like the "encyclopedia of deviant sex." We have had that magazine several times. We had convictions with it so when we find it, we prosecute it again.

They do have commentary, but when I read the commentary, and when the police read the commentary, they also have the opinion that this, you know, I don't think this was a serious attempt at education. It was merely kind of a gross or crass, you know, blow-by-blow description to keep the pictures somehow legal or something. It didn't seem to be a redeeming magazine to me. There was base language, and it just talked about, you know, if you have problems in your marriage maybe it will help you and there were further pictures—

THE COURT: Mr. Taylor, I know that our reporter is very excellent, but he only has ten fingers.

MR. FAHRINGER: Mr. Taylor, slow down a little bit.

THE COURT: Slow down, Mr. Taylor.

BY MR. FAHRINGER:

Q. I'm sorry. You were saying?

A. Okay. Just when I read the story or things mentioned, as far as medical purposes, if you are having marital problems maybe or difficulties the answers or something for that, they would have a paragraph talking about the problem. They would have several pictures of people engaged in intercourse. I don't think that had any serious value. So the magazine we examined, the written word, didn't seem to change our opinion of the pictures.

Bruce A. Taylor by Mr. Fahringer

Q. Would you make a judgment as to whether or not the commentary, the printed commentary, was in good faith, or just superficial?

A. Well, as far as good faith, I thought that, you know, the ones I had seen weren't in good faith. This meaning that they were just — that the book was just published for the purpose of showing the pictures rather than giving you a commentary. So for that reason, it wasn't in good faith.

Q. I take it then, on that basis you said "Go ahead with the prosecution"; you okayed it?

A. Right.

Q. Now, how is that normally done; how, ordinarily, would you approve the prosecution?

Is that orally; would you just simply say, "I agree with you. I think this suits the guidelines and go ahead and proceed to get a warrant"?

A. Yes. Usually the police officers would just come in with a warrant for the magazine, you know, and you just look at it briefly and sign the complaint and they do it their way.

Q. Let me ask you this: Do you sign the complaint?

A. I sign several of them. All the other prosecutors sign them too.

Q. Let me ask you this: In terms of your specialty, if the others — I take it there were prosecutors who would sign them. I think of you as the man primarily concerned with the obscenity prosecutions, and I take it there was no set procedure where you would examine most of the materials that were purchased to determine whether or not a prosecution should be inaugurated?

A. No, whichever prosecutor was available would sign the complaint and the search warrant.

Q. Now, were there any written records kept of this where you would say "I'm rejecting this publication because I don't think it meets the guidelines," and then a report would be made of that?

A. There would have been a report kept had that ever been done. Police obviously have to make reports on every transaction where they make a buy or purchase; but there's never been a time when a police officer seized a film, or bought a magazine, that I didn't issue on. Also they have described different magazines to me that I told them not to bother with, but those, since they never bothered, we never got on the subject of a report. There probably wouldn't be.

Q. So that in terms — the date I keep in mind, April 1973, from that time on, there was never a situation where they purchased anything that you rejected?

A. Not that I can think of.

Q. Okay. With the exception of the one incident that you described to us about some children's book, that there was no sexual activity, I take it that all of the cases that you saw and prosecuted and were brought into the office, did involve some explicit sex?

A. Most of them did, yes.

Q. Can you think of any, other than the ones you told us, that didn't?

A. Some of whom we had gone to trial with had pictures of women — weren't bisexual magazines. It wasn't two women or there wasn't a man and a woman. There was some just with pictures of one woman engaged in what appeared to be masturbation, et cetera, and just exhibiting her genitals.

Q. That, of course, would be sexual activity; but, masturbation with just one person involved?

A. Yes, but without like penetration or things like that.

Q. In other words, the masturbation was not explicit?

A. Wasn't as explicit, right.

Q. Now, were those cases successfully prosecuted?

A. Yes.

Q. All right. You mean you got a conviction on a magazine with just a woman appearing to masturbate?

A. Yes, we had last year, 1976, we had about 18 trials. Two trials were dismissed on the — by the judge on a motion to acquit. One jury verdict was not guilty on a magazine; and all other 15 were guilty.

We really had only one jury out of 16 that ever came back with a not guilty verdict. When we asked them later they said it wasn't based on the obscenity of the magazine, but on the proof of—

Q. Knowledge.

What I'm interested in is on the situation with the magazine that you described that just had a woman who was engaged in what appeared to be masturbation.

Do you know, specifically, whether or not there was a conviction on that magazine by a jury?

A. I can't remember.

Q. Okay. Now, in terms of that category of material other than what we normally think of as hard-core pornography, where there is explicit pictures of penetration of men and women, men and men, women and men or what-have-you, what portion of the prosecutions involved just that category of what you described; a single person appearing to masturbate?

A. Probably a small percentage. Most of the cases, probably nearer to — maybe 90 percent involved explicit intercourse and penetration.

Q. Now, I don't mean to pressure you on this, but would it be fair to say once you began your part in prosecuting the cases, virtually all of them involved explicit sex of one sort or another?

A. Yes.

Q. Okay. Now again, when we're talking about explicit sex, we're talking about either heterosexual activity or other forms of sexual activity whether it's actual penetration, or actual photographs of sexual behavior?

A. Yes.

Q. All right. Now, you indicated there were times when the officers described some publications to you, and that they would come back and apparently what the procedure would be they would say "Well, we saw some books at such and such a bookstore," and you indicated to them "I don't think you ought to bother with them."

Can you describe the type of material that was?

A. They had made a few arrests on magazines, newspaper-type magazines called "Screw" and several others. They had the same format as newspapers — not magazines — with newspaper pictures rather than glossy pictures.

Some of those they had made arrests on, and they said they also got them here and there at different newsstands, and I believe I told them not to bother because we already — we had one file on Screw newspapers, and I think—

Q. What happened in that case?

A. I'm pretty sure there was a conviction.

Q. Okay.

A. And we had some that we — several of those were brought up when the former sergeant of the unit, Sergeant Schmidt was on duty. He purchased several of the Screw newspapers. He has since left the department for health reasons, and most of those cases we had to drop. We never really got to do very much in this area only because he left the department.

Q. Now, was your reason for not pursuing -- because I understand, Mr. Taylor, and I don't mean to put words in your mouth, the standards are constantly changing and I take it, somewhat, the attitudes of the prosecutor as to what should be prosecuted and what shouldn't. I'd like to know, more specifically, in terms of your more recent judgment that a magazine or newspaper like Screw should not be prosecuted, what is the actual basis for not prosecuting; is it on the basis of your view that that material is protected, or is it on the basis that you already got a conviction sometime ago?

A. Mainly that we had made so many arrests, and several cases still pending; although, they have not been told not to buy that magazine for the purpose of prosecution. They still probably will in the future because they purchased not only Screw, but there are a couple of others namely Smut, which is the title of another newspaper tabloid; and there are several that are now pending. Most of the time, when I go into the stores, there are several magazines with pictures on the covers, and for knowledge purposes it makes it easier, usually, to go with the others.

Q. I might ask you this: On the Screw conviction, was that sustained on appeal?

A. We haven't had any sustained on appeal.

Q. You mean all the convictions have been reversed?

A. All of them reversed at least since I have been here. There

have been about — all of last year's are still on appeal. Since I have taken over, we haven't had any case come up—

THE COURT: Mr. Taylor, what you mean is that all of them went to the Court of Appeals, and the Court of Appeals has made a decision to reverse. Not all of the convictions have been reversed.

THE WITNESS: Right.

All the trials that ended up guilty verdicts went to the Court of Appeals and were reversed. None were reversed on the issue of obscenity. All were defects in the charging or complaint.

BY MR. FAHRINGER:

Q. What we normally think of as procedure?

A. Procedure. Although we have never, since I have taken over, renovated the procedure, those have not been tested. Yes, they're all pending.

Q. Do you mind if I ask you how many convictions are now pending on appeal where there hasn't been a disposition?

A. I think there are 15 or 16 trials, maybe even 17 jury trials that are on appeal; and there are, I think, six or seven motions to dismiss and motions to suppress that I appealed and asked the Court of Appeals for. There are about 20 cases now pending.

Q. All right. Now, just a few more questions then I intend to be more specific.

In terms of the prosecutions, and the guideline, what I think about in terms of the category of guideline, have you ever had a magazine or publication described to you, and you described one incident that I asked you about, Screw magazine, but have you ever had a magazine or publication described to you that you declined to prosecute because you thought it had some, for

want of a better term I'll use the old label, redeeming social value, or literary, or artistic, or political or scientific value?

A. No. Mainly because the police officers brought me material that I didn't differ with their opinion.

Q. Now, you use from time to time the term "hard-core pornography," don't you?

A. Yes.

Q. And that is, if it is the same as mine, that is the explicit pictures of sex where you're talking about penetration, and so on and so forth?

A. That's the street definition. That's the one people generally know. That's not the definition that I think the Supreme Court thinks about.

Q. Incidentally, I meant to ask you about that. When you took office, and began participating in prosecutions, you mentioned the Miller test and only hard-core pornography was to be prosecuted but in terms of the Supreme Court definition of it, right?

A. Right.

Q. And did that influence you in the judgments that you made on the hard-core pornography aspect?

A. Well, I didn't really have to because I think we had been prosecuting material which would have been obscene under any definition of "hard-core" before and after Miller. At least, I never got into the case until after Miller.

From what I saw, they were also what I would think the courts meant when they said "hard-core"; and even when we prosecuted the magazine with the little children in it — little girls, eight, nine, ten-year-old girls — I thought that was hard-core pornography even though it didn't have any sex because

the way I read the Miller test which said lewd exhibition of the genitals, and I read the Paris art case—

Q. Now, in terms of the material that would be excluded by Miller, can you give me any examples of what you might consider not hard-core pornography in the field of sexual material?

A. I imagine — I'm not sure I ever looked at every page of Joy of Sex. I imagine the Joy of Sex may not be hard-core even though the drawings are explicit. From what I know of the publication, the commentary — well, that would be literary — scientific — There are drawings that accompany it that I would think would redeem it, and so that the pictures were put there for a purpose rather than for exploitation or for reading hard-core—

Q. I understand that. That's a little different than the question I asked you.

I appreciate you could have hard-core pictures. That is to say actual penetrations that are salvaged, as it were, by reasons of — you know, it is a medical book. But let me ask you this: Can you think of any photographs of people, men and women, that would be sexually oriented, and would not be hard-core?

A. There probably could be. Now, when you say sexually oriented—

Q. There's—

A. —magazines like nudist magazines which I know have been held by the Supreme Court not to be obscene. Certainly those have nude persons in those. They don't have sex in them. They obviously can't be hard-core.

Q. What about magazines that just consist of women in the nude with their genitals fully exposed, could you conceive of a situation where that wouldn't be hard-core, or do you think everything is hard-core?

A. No. I think that you have to judge mere non-sexual nudity as — if it is not lewd exhibition of the genitals, and then it can't be hard-core.

There was an opinion of a Common Pleas judge in Ohio back in the late '60's which describes a magazine that had pictures of a woman, you know, bending over spreading her legs. It's one thing to stand up in the nude, and show a full frontal nudity, and another thing to spread your legs. Because then you can tell by looking at the picture what her intent was by being in that position which means to show the genitals. I always read hard-core exhibition of the genitals as meaning focal or prominent, obviously—

Q. Is that your standard on that—

A. Yes, that's my—

Q. In other words, your definition of lewd display of the genitals is what?

A. Those descriptions or depictions that bring the genitals into obvious focal or prominent view.

Q. Now, nevertheless, in the last two years, I am correct in your prosecution — the history of your prosecution, you have always prosecuted actual hard-core pornography in terms of sexual penetration and explicit pictures of men and women having sex of various kinds, isn't that true?

A. That's pretty much true. We only ventured into what we call "soft" — what would be street language — "soft-core" a few times.

Q. Now, what is your definition of "soft-core"; we better get that straightened—

A. There is no legal definition of "soft-core" I don't think.

The street definition of soft-core could be pictures which show nude people maybe in a simulated position of intercourse.

Bruce A. Taylor by Mr. Fahringer

Where you can't see the genitals, or a picture of people having intercourse where it is so dark or smoky that you can't quite see. Then you have medium-core pornography which would be maybe a woman holding a man's penis or, you know, fondling a breast. Not actually showing any intercourse. Like The Last Tango in Paris, you could see them actually engaged in the motions which would be intercourse, but you couldn't actually tell the actors' — whether they were really doing it or not.

When something is hard-core on the street, you can tell that the actors are actually engaged in intercourse. Medium-core, you couldn't swear what they were doing or—

Q. By way of an example, a man could be lying between a woman's legs in such a position you couldn't tell whether or not his penis was inserted in her vagina, as an example, but it gives you the impression they are having intercourse. The difference between that is a close-up of the penis actually inserted in the vagina, by contrast.

In your mind, the one would be hard-core, that is the actual explicit picture of the penis inserted in the vagina, and the other would be soft-core because you couldn't tell whether it was?

A. That's according to the street definition.

I read the Supreme Court definition when Miller said actual or simulated, I thought that included simulated and hard-core. Therefore, the medium-hard-core definition were kind of mended into one, and you define hard-core as being not only pictures and what they show, but their effects as far as prurient interest and serious values—

Q. Now, nevertheless, if I understand your testimony correctly, going now to soft-core, that when you took over in April of 1973, this office, you didn't prosecute any soft-core?

A. And I still don't — I never seen anything that we prosecuted even until today that I would call soft-core in street language.

Bruce A. Taylor by Mr. Fahringer

Q. So that soft-core hasn't been prosecuted?

A. It's been what people would call medium-core to hard-core.

Q. Yes. Okay. Right.

Now, before I leave this, I wanted to just ask you again, in terms of nudity. Is there anything else, in the field of nudity, that you would not consider hard-core under Miller's definition. I want to talk now strictly about the legal definition?

A. Yes. I think there is. Had the pictures of the little girls in those magazines not been of little girls, and had they been with maybe pictures of this with adults like they are in nudist magazines — this magazine showed little girls and little boys together, and that's all. I think these would be hard-core because of the way they were set up. It would be soft-core and not obscene at all if they hadn't been focused just on little kids without any clothes on, and if it were in a different setting, that type of situation.

Certain magazines that show and certain films that show nudes, I don't think constitute obscenity and hard-core. Well, like the Godfather. It had pictures of breasts and you could see pubic hairs. I don't consider that obscene.

Q. Now, I wanted to ask you in terms of adults, and I don't mean to get back to the young people, but in terms of adults, and again, talking nudity. I think it would be smart to talk about women because they appear more in these magazines than men.

As far as the women are concerned, do you consider the fact, merely because pubic hairs are shown, that that meets the hard-core definition of Miller?

A. No.

Q. All right. And do you consider merely because the — and I want you to listen carefully to my question because I'm really

interested in your definition. I'm talking only because, and all other factors aside, only because the vagina is in some way exposed more fully, that is to say where you might be able to see more than just pubic hair in the vulva or into the really internal parts of the vagina do you consider that, in and of itself, hard-core just by itself?

A. It can be. It only depends on how it is portrayed. I think you have to judge hard-core not just on the pictures, but on the other two tests, prurient interest—

Q. Yes, and—

A. —and I have been very strict in telling the police, and in my own decision, that the pictures alone have to be read by the whole content of the book; and the pictures in one — the same figure in one book may not be obscene when it is in another book.

Q. Now, in that context, Mr. Taylor, where you're dealing only with nudity and there is no suggestion of sexual activity of any kind, but just girls' pictures in full frontal nudity with perhaps the genitals fully exposed, do you give any consideration — or would you give any consideration to the balance of the magazine, the articles or the stories—

A. Well, certainly the articles that were included within that portfolio and the pictures would be considered. In any magazine, you have to judge the rest of the magazine also. Certainly, if you had a magazine that had just one obscene section, and the rest of the 500 pages, or whatever it was, had nothing to do with sex, you might not be able to find the whole magazine obscene. As long as the sexual issue or part had something to do with the purpose of the rest of the book, the rest of the book certainly has a bearing on the book.

Q. I take it then that you would consider the balance of the book?

A. Certainly.

Q. Now, let me ask you this: Very quickly. Have you ever prosecuted, and up until this time, I'll see if I'm correct, in terms of just frontal nudity and the exposure of the genitals, I take it, you have never in your five hundred and some cases you have talked about, you have never prosecuted a case that involved just that; other than the situation you talked about with the children?

A. Well, Screw magazine is like that. It didn't have any actual penetration. The one we saw, Smut magazine, although it did have a girl sitting at a typewriter with no shirt on, and girls with genitals exposed and a commentary to that magazine, that magazine has no sexual activity that I know of. Not the one that I saw; but we did prosecute it.

Q. The one we defended in Wichita, going back two years, certainly did.

I don't know — I'd like — because I appreciate you giving us your best recollection, but are you saying the ones that you examined, the issues of Screw and Smut, didn't have explicit sex?

A. The ones that I remember — I don't look at them in that detail that I would remember everything in them.

I remember the magazine and the newspapers not having explicit sex shown.

Q. How long ago was that?

A. Last summer. Maybe, last spring.

Q. Well, you know, it's not my position to quarrel with you. I must indicate though that the ones that we have seen have pretty much explicit sex, but that's—

A. That's—

Bruce A. Taylor by Mr. Fahringer

Q. —your recollection is what we're investigating here.

Now, let me ask you, and I have been a long time getting here so forgive me.

When the Hustler magazine was first brought to your attention, as I understand from your brief and some of the statements you made in court the last time, a complaint was made about two incidents. One was a cartoon involving Mrs. Ford, and I believe this cartoon involved a mastectomy. Did I misunderstand, or was there also a cartoon involving the Statue of Liberty?

A. No, there was only one cartoon in the July issue having to do with the Statue of Liberty, and Mr. Ford, Kissinger and Rockefeller. I don't even remember anything about Mrs. Ford.

Q. All right. Let me take that first. In that episode, as I understand it, a complaint was made because of that cartoon involving three political figures apparently engaging in sex with the Statue of Liberty?

A. Yes.

Q. Is that what prompted you, and I'm only talking about what prompted you, to investigate the magazine?

A. No. Because by the time it came to me, that was all done.

Q. I'm sorry. What did you mean by that?

A. As I understand it from the police officers, someone sent a copy of the July issue to Captain Delau. He's the direct supervisor to the unit. There's the sergeant and then Captain Delau.

Apparently, someone sent the magazine to him, and he got a few phone calls about the cartoon in the July issue saying, "Look what they're doing to our president," et cetera.

Then Captain Delau turned the magazine over to the officers in the smut squad and asked them if they could submit it for a

determination from me and the judge if they could make a case out of it.

When it came to me, the officers had already gone out and found if it was selling and what Hustler magazine was and—

Q. I understand that. You're still the one that was being consulted as to whether or not it should be prosecuted?

A. Right.

Q. And I take it, in terms of it being brought to your attention, it was primarily brought to your attention because of that cartoon?

A. That's the reason the police got it.

Q. All right.

A. Apparently.

Q. All right. Now, the magazine has come to you, and you are — incidentally, can I ask you in terms of a complaint. Were these written complaints or complaint?

A. The magazine was mailed anonymously to the police department as far as I know. The phone calls they were just from people that called up and they keep a little, you know, a little note—

Q. A record is kept?

A. Just, usually, what time the thing came in, and sometimes — I don't even know if they keep those.

Usually, they say "yes, we've got six or eight in one day" on this little scratch pad.

Q. Do you know how many complaints were made in connection with Hustler?

A. No.

Bruce A. Taylor by Mr. Fahringer

Q. Did you investigate at all the number of complaints.?

A. No.

Q. Do you know, just in terms of your recollection, whether it was more than a half-dozen or what it was, 12 or what?

A. The officer described it as "We got a few or several complaints" — I don't know, exactly. Steve Nemeckay—

Q. Is he the one that would know about that?

A. Probably.

Q. Okay. Now, you then examined the magazine, is that correct?

A. Yes.

Q. All right. Now, at that point, if I understand correctly, you had never prosecuted a magazine with just full frontal nudity or with genitals fully exposed, right?

A. The only one I remember is the Screw magazines, and we had some films that had just one girl masturbating herself without inserting her finger into her vagina.

Q. But leaving pretty clear the impression that she was masturbating?

A. Masturbating, sure.

Q. And that was one film.

A. Oh, we have had several like that that I can remember. They're on appeal now. I imagine that will be decided.

Q. But the great bulk of your work was explicit sex, and as you indicated awhile ago, it was hard-core?

A. Certainly that was the first one we went after that was nationally distributed, and was a second class mailing privilege type magazine.

Bruce A. Taylor by Mr. Fahringer

Q. Now, incidentally, you have never prosecuted any magazine — I'm talking about magazines now, based upon their cartoons, had you?

A. Not that I know of; although they're talking about prosecuting the cartoon of Fritz the Cat.

Q. But that was all cartoon?

A. All cartoon.

Q. With explicit sex in it, or simulated—

A. Apparently. I didn't see it. Apparently it never was shown in Cleveland.

Q. You had never prosecuted a magazine other than that episode strictly on cartoons?

A. Not that I can remember.

Q. All right. Now, you had never prosecuted a magazine that contained just printed material either, had you?

A. Not that I can remember; although they did have one for just cartoons, but that was a prosecution involving the sale of—

Q. A minor. It wasn't to an adult?

A. No.

Q. Now, you examined the magazine, I take it?

A. Hustler?

Q. Yes.

A. Yes.

Q. I'm taking you back now to when they brought the magazine to you, and you had to make a judgment as to whether or not a prosecution should go forward?

A. Yes.

Q. And I take it — did you examine the cartoon, the political cartoon?

A. Yes. Briefly though.

Q. Now, incidentally, may I ask you this question, Mr. Taylor: I'm advised that you have appeared on television and you have spoken publicly on this subject. Did you make a statement on one of the television shows that the reason that the magazine was brought to your attention, and the reason that the prosecution was launched was because of this political cartoon?

A. On the Channel 8 interview that I did, they asked me is this what brought it to their attention, and I tried to clarify that that is what started the police officers noticing that magazine; and I did admit "yes," somebody had made complaints about this cartoon, but that's not the reason we prosecuted.

Q. Well, have you seen a transcript of that — this interview at all?

A. No.

Q. Do you recall, and I only ask you if you recall, indicating that that was one of the reasons the magazine was prosecuted?

A. No, I think — I mean, the way I remember it, and I told them ahead of time what I meant because they had told me what questions they were going to ask.

Q. I'm only, incidentally, asking what actually you said on the air?

A. I told them the reason the magazine was prosecuted — one of the reasons was because of the complaints that were received on this cartoon.

Q. I see.

A. That certainly has nothing to do with why this magazine was prosecuted.

Q. Again, I'm not trying to be cute with you, but the point of it is that you did indicate, at least publicly, that one of the reasons this magazine was prosecuted was because of the cartoons?

A. One of the reasons that they were prosecuted, but not one of the reasons they were charged. I think there is a difference.

I didn't base the cartoon as part of the charge. As a matter of fact I told the police—

Q. I'm not saying that—

A. I told the police that the cartoon was the most protected thing in the whole magazine.

Q. But the fact of the matter is that the investigation started based upon the cartoon?

A. Because of the cartoon, yes.

Q. And you indicated at one point, publicly, that one of the reasons it was prosecuted was because of the cartoon, as I understand it?

A. I don't remember.

Q. All right. Now, what you are indicating is that there was other reasons too, right?

A. Well, I think the magazine was prosecuted and charged in spite of the cartoon rather than because of it. Like I said, I told the police that it was the only thing in the magazine that would be the most protected form of expression contained in it.

Q. Was any report made in terms of a decision to prosecute? I'm talking about the July 1976 issue of Hustler. Was there any written report made up as to the basis for prosecuting this magazine?

A. By me, no.

By the officers. They all made out duty reports, and described where they went and what they found in the magazine. I think—

Q. Would that contain any information why the magazine was prosecuted?

A. It might.

Q. Okay.

A. It might indicate that there was some part of the magazine that the officers singled out as being, you know, noteworthy or something—

Q. Let me ask you this: Who would have those reports; would that be Mr.—

A. Steve Nemeckay.

Q. All right. Now, going to the July 1976 issue of Hustler, let me — just bear with me for a moment.

Do you happen to recall the page that the cartoon is on; I thought we ought to identify it.

A. Probably in the middle, I assume, because there was a two-page spread.

Q. All right. I'm showing you — should I have this marked—

A. I'd rather you didn't. That's the police officers—

Q. I won't mark it if we can just identify it.

This is the July 1976 issue of Hustler that bears an inscription on it that appears to—

A. That's the officer's initials and date of purchase.

Q. All right.

Bruce A. Taylor by Mr. Fahringer

A. Nemeckay, Badge 1577, and dated 7/2/76, 10:30 A.M., at 1834 East Sixth Street, and then that's the other officer's — John McNamar's name, and number and same date.

Q. Using that issue that will be deemed — we might, Your Honor, may we just say deemed marked Defendant's Exhibit A, deemed marked A.

I turn to what would be page 86, I believe. Let me make sure of the page. Eighty-six and 87, and is that the cartoon that the complaint was made about?

A. Yes. Apparently that's it.

Q. All right. Now, while you have the issue there, when you examined it I wonder if you might tell us what other portions of the magazine you relied upon as being hard-core pornography under the Miller definition to initiate the prosecution?

A. Okay. Now, as you know, the main part of that Miller test is does the work, taken as a whole, appear to prurient interests and lack serious value. And the second test, does it contain actions as defined by law, State law.

The magazine has numerous pictures of women with their genitals prominently exposed, et cetera, which is not uncommon in many magazines. There are, not as far as I can see, actual scenes of penetration other than simulated ones, and I didn't read all the stories or all the letters, but several of them have to do with sex which in my opinion didn't seem to be educational or scientific. There are several pictures of men with their penises out — and hanging out, et cetera, which appears to be just pictures just showing that, and no other purpose.

Q. Well, what my inquiry is — first of all, let me ask you this: By the process of elimination were there any stories that you can see in the publication that you relied upon, just the

printed word, as being, in your judgment, hard-core pornography?

A. Almost all of them.

Q. All of the stories, or all of the articles?

A. Almost all of them. There is an interview with Althea Leasure there that didn't seem to be sex-oriented, really.

There is a — there is one story, I don't know the name of it, it's hard to tell. It starts on page 29. That seems to be, you know, a story about people which describes sexual activities.

Q. Well, are you saying because the story describes sexual activity, you felt it was hard-core under the Miller test?

A. In this case, yes.

Q. All right. Let me ask you this: Did you read all the stories in the magazine at the time?

A. I haven't read the magazine cover-to-cover.

Q. Before you would authorize the issuing of a complaint, did you read all the stories?

A. Not every single word.

Q. Which stories did you read?

A. I looked at — I panned through and looked at all the pages.

Q. Let me ask you this—

A. I examined the stories more than read them.

Q. When you say you examined them, what did that mean?

A. You know, reading a paragraph here and there. That is bold letter captions — certain parts where they get more explicit than other parts. I skipped over the parts where they're walking and talking.

Bruce A. Taylor by Mr. Fahringer

Q. And you made the judgment, Mr. Taylor, you made the judgment on the articles on a spot reading?

A. Well, on a one-time reading. I only examined the book once before the warrant was issued, as a matter of fact.

Q. How much time was spent examining it, to your best estimate?

A. Oh, maybe 20 minutes.

Q. Okay—

A. Maybe less than a half-hour.

Q. Okay.

A. There was a lot of discussion, and only 15, 20 minutes of actually examining the magazine.

Q. Could I just take the magazine and look at it with you going through it? Did you read the publisher's statement?

A. Yes, I have read that.

Q. That wouldn't be the basis of prosecuting the magazine?

A. No one thing is.

Q. Well, did that enter into your consideration at all, the publisher's statement?

A. Not really.

Q. What about the feedback letters to the editor?

A. It may — although the editor's statements does say something about the general tone of the magazine, the purpose. So I read it, and I didn't rule it out.

Q. On the day that you examined the publication, the 20 minutes you were able to spend just going through the magazine, did you read the letters to the editor?

A. I read some, but not all.

Q. Do you remember which ones you read?

A. No, I skipped around and looked—

Q. Did any of the letters form the basis of your opinion for prosecuting the magazine?

A. Not alone, but—

Q. But did they, in part?

A. Just the fact that they were there, and what kinds of — well, what kinds of content the letters spoke to. I mean, all the letters pretty much were talking about the same things, and had some bearing on my decision.

Q. Let me understand, you didn't read all the letters?

A. Not all of them.

Q. Okay. You weren't able to, on that occasion, to tell what all the letters said?

A. Not all of them, you know, most. The ones that I read were maybe — I read all — maybe half of the letters, and I looked at a few sentences of some, and maybe half of the rest.

Q. Okay. How about the advise and consent. Did you read any of the advise and consent?

A. Yes, some.

Q. How much of that would you say you read?

A. Maybe a third.

Q. A third of it?

A. I imagine, yes—

THE COURT: Mr. Taylor, I can't hear you.

THE WITNESS: Maybe a third, Your Honor.

BY MR. FAHRINGER:

Q. Did the advise and consent play a part in the prosecution of the magazine?

A. Yes.

Q. In what way?

A. When I felt that the types of questions and answers that were picked by the magazine to make an issue to answer, and which ones they felt should be in the magazine. I felt that was part of the tone for the whole magazine. I was trying to find a common part throughout the magazine that I could pin as taking it as a whole.

Q. Do you remember, specifically, reading any part of advise and consent that stands out in your mind?

A. Just that I — I can't remember today, you know, like any particular fact situation. But I remember most of them had to do with a lot of questions about what do I do with certain kinds of girls. I have a story I'd like to tell you, and the stories seemed kind of far-fetched to me.

Q. Okay. What about bits and pieces, did you read any of that?

A. Yes. There are several pictures in there and a little commentary that goes with the pictures. I really looked at quite a bit of that.

Q. Did you feel as though that contributed at all to your decisions for prosecution?

A. Oh, certainly, yes.

Q. Why is that?

A. Because most of—

Q. What about — I'm sorry. I didn't mean to interrupt you.

Bruce A. Taylor by Mr. Fahringer

What about asshole of the month. Did you feel that should be a part of your judgment to prosecute because it contains the prosecutor, Mr. Larry Parrish?

A. As a matter of fact, I didn't know who Larry Parrish was when I read that first Hustler. That was the first time I had ever saw what they called asshole of the month. That again is probably what I would feel was one of the things that, in spite of its existence, you know, and led us to go after the magazine, that probably was the most protected thing they can say—

Q. What about, what sort of man that reads Hustler, the description of the type of man, that guy in the bar, working man, did that play a part in your judgment?

A. Not so much, no.

Q. All right. Now, how about the picture of Uncle Sam or at least a man who purports to be, and a song which is in rhyme and is sort of styled after the Star Spangled Banner, did that contribute at all to your decision?

A. Yes, because it seemed that — yes, because of the orientation towards sex that it had.

Q. You mean the orientation that merely his pants are down?

A. Yes.

Q. And his penis is exposed?

A. Yes.

Q. And that was it. That was the basis of your judgment?

A. As far as that picture goes. Certainly, that can't be taken alone.

Q. Now, the rest of these — are there any of these — how many of these did you read, would you say?

A. I can't remember. Maybe a fourth, you know, of everything. I'm not even — maybe not that much.

Q. Now, going onto the next category, "Sex Play." Are you familiar with that feature that appears regularly in Playboy? Did you read "Sex Play"?

A. I'm kind of familiar with it now. I noticed it appeared in the August issue and again in the September issue. That's the three issues we had been dealing with.

Q. Did you read "Sex Play" in this issue?

A. Some of it. I looked to see what kind of article it was.

Q. How much of it did you read?

A. Maybe a fifth.

Q. All right. And did this article on sex between the couples, did that contribute in anyway to the prosecution?

A. Yes.

Q. In what way?

A. I thought it was a story which wasn't really to cure serious sexual habits. It was merely a story about people engaging in sex.

Q. Now, to that extent you are making a judgment of the good faith of the article?

A. I'm making a judgment on whether or not it appeals to certain types which I call prurient. That is my judgment — was at the time.

Q. In other words, if an article which purports to be one written in terms of sex and structure, or whatever you want to say, in terms of adjustment between a man and a woman, and men and women concerning their sex, if it is written in that light

and along that pattern, you make a judgment as to whether or not you think it would be appealing to an average person's prurient reading—

A. Reading prurient interest as a shameful or morbid interest.

Q. Well, is there anything shameful or morbid in this article?

A. I thought most of the article was morbid—

Q. No, I'm talking about "Sex Play." Is there anything in that article that you thought was morbid or shameful?

A. Yes, I got that — the way I interpreted the tone of the article.

Q. What part of it?

A. Because — the description of indiscriminate sex, and that's like all that was on their minds; and all, you know, they had time to do. It indicated that was the attitude that was trying to be portrayed by the magazine.

Q. That was based upon by reading one-fifth of the article?

A. Yes.

Q. Now, "Sex Play." That's the next category, and that appears to be news around the country of different events having to do with sex in news items.

Did you read those?

A. Not as much, I don't remember.

Q. So that wouldn't have entered into your consideration?

A. Well, I can't say it didn't.

Q. Well, if you hadn't read it, if you didn't read it?

A. I didn't read all of it, that's for sure.

Q. Well, did you read any part of it?

A. I remember reading part of that. I remember that I read certain little parts of everything, and greater parts of a lot of things, all of some, but not all of everything.

Q. Now, in terms of the first photo series that we have, "I've got a secret Janet."

Do you feel that that picture of a woman in the nude, as she is exposed there, do you believe that fits the definition of hard-core pornography as defined by the United States Supreme Court — that picture by itself?

A. I don't think the one picture by itself can. If the picture is in a book, you have to decide in relation to the rest of the book.

I can't pick out one picture and say that picture is obscene. Maybe alone it isn't obscene.

Q. Well, if you took this alone?

A. If you took that picture and stuck it in a frame and put it on the wall and asked, "Is that picture obscene?" I would say no.

Q. Now, what about the one with her pants; would you say the same about that, that by itself would not be?

A. That would be hard to say. Probably not.

Q. What about the next one then?

A. The next one I wouldn't rule that out. I might say that's obscene.

Q. And how about this one—

THE COURT: You said that is obscene or that isn't obscene?

THE WITNESS: I would say that probably is.

THE COURT: Probably is?

THE WITNESS: Yes.

BY MR. FAHRINGER:

Q. What about the next one; so we know what you are talking about here, for the record, these pages are not all numbered.

I'm talking about the picture on page 27. The way she posed there, would you say that this picture by itself would meet the hard-core pornography—

A. It could.

Q. "It could." You're not saying it would?

A. No, I don't ever say that it does. I say it probably could.

Q. How about that picture, that would be on page 26? Would that—

A. That could.

Q. It could, all right.

Now, did you read the story, I guess—

A. "Gloria".

Q. "Gloria", Did you read that story?

A. Not all of it.

Q. How much of it?

A. Maybe a fifth, maybe a tenth.

Q. Do you remember what the story dealt with?

A. Just that it dealt with two people mostly.

Q. Do you remember whether it involved natural sex or unnatural sex?

A. The two people were engaged in all kinds of sex intercourse. Fellatio, cunnilingual, that's just about all it dealt with.

Q. How much of it did you read?

A. Well, maybe one page out of how many pages the article is. Maybe it would be like a fifth or—

Q. —that much appeared in that portion that you read?

A. Yes. It seemed like the whole stream of the article — that that was the whole stream. In reading the first couple of words, the sentence, the whole stream of the article dealt with that, and I don't think anything else.

Q. In terms of taking that article by itself, if that were published by itself, would you consider that to be prosecutable; just the story?

A. Yes.

Q. Why is that?

A. Because it deals with nothing but sex for its own sake, and meets all the tests.

Q. Now, as far as the cartoon on page 34, a woman in what appears to be a prison with the police officer sitting there, which would be a guard, "I'm here to make a conjugal visit, anyone would do."

Would you consider that hard-core pornography under the Miller test, by itself?

A. No. Not by itself.

Q. Now, the next photo series which starts at page 39 is "A day in the life of a gynecologist."

The first series of pictures is where a woman is undressing and is being examined by a doctor. Would you consider that hard-core pornography under the Miller test?

A. This first set—

Q. Yes. The two pages. There's one, two, three, four, five, six, seven pages.

A. Maybe those two pages would.

Q. By themselves. I only mean to take them by themselves. I intend to examine the magazine by itself. Would you consider that picture, by itself, hard-core pornography under the Miller test?

A. No.

Q. How about those that come in the next two pages where the doctor is making an examination?

A. Well, read within the whole portfolio, yes. Maybe it would depend on what would appear — certainly those same pictures would appear in a medical journal—

Q. And you wouldn't consider them obscene?

A. No.

Q. Now, the interviews with Althea Leasure, you didn't consider them to be hard-core pornography under the Miller test, did you?

A. No.

Q. We're moving along the series of photographs that include, well — "X-rated reviews of films." You wouldn't consider that hard-core pornography under the Miller?

A. Well, I think that had something — that obviously is one of those things which is consistent in the vein of the nature of making that book for the—

Q. But if it involves real reviews of movies, then you consider it obscene movies they review?

A. They do so in a way where I think it is not serious except that kind of attempts to be but—

Q. Well, if these were alone, would you prosecute them by themselves; if it were just a pamphlet?

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Would you prosecute that — the reviews of the films by themselves, taking your—

A. I might be able to do that like you prosecute a newspaper for advertising Deep Throat.

Q. Well, my question is quite frankly that if this came out by itself, these two pages, "X-rated reviews of films," and assuming they are genuine and legitimate films, would you, if the police officers brought it into you, would you be inclined to prosecute that?

A. Probably not.

Q. The same would apply to the books. If they just came in by themselves, the reviews of the books?

A. Probably not, again.

Q. Okay. Are there any cartoons in here that you recall, if they were standing by themselves, that you would consider it to be hard-core pornography under the Miller definition?

A. Oh, yes, a lot of them.

Q. Would you consider this one on page 61?

A. Yes.

Q. That you consider hard-core pornography?

A. Yes.

Q. Do you take into consideration at all, if this cartoon is to entertain or is to be humorous; do you make any distinction at all?

A. Well, just the practical one. Not really. As far as the cartoons are out, and only the pictures are in.

Q. Well, now, going to the next series of pictures of "Evelyn" which says "Pink is beautiful." Taking the first picture which

appears on page 62 and 63, that picture, by itself, would you consider that hard-core pornography under the Miller test?

A. No.

Q. What about the picture on the right which would be page 65, is that picture there—

A. Yes.

Q. You would consider that to be hard-core pornography under Miller?

A. Yes.

Q. Why?

A. Because the genitals are exposed and almost nothing else. You can see part of her breasts. It seems that's why they took the picture. The picture is of the girl's thigh and again not of the girl.

Q. Would you agree that is subjective judgment on your part?

A. Certainly.

Q. How about this picture down here with the girl laying on her stomach, would you consider that to be hard-core under Miller?

A. Yes.

MR. CAMBRIA: What is the page?

MR. FAHRINGER: I'm sorry. It would be 61, 62, 63, 64, 65, 66 — 67. The bottom of page 67. There's a girl laying on her face with just her rear exposed. Would you consider that hard-core pornography under Miller?

THE WITNESS: Yes.

BY MR. FAHRINGER:

Q. Why?

A. Because she appears to be masturbating.

Q. It appears she is masturbating?

A. She is sitting on her hands. Her hands are in her genital area.

Q. She's lying on her hands?

A. She's lying on her hands. She doesn't have any clothes on.

Q. That, in and of itself, wouldn't be a basis—

A. As to the idea that she might be masturbating.

Q. Now, on page 85, "Hustler Humor," would you consider — do you remember reading "Hustler Humor"?

A. Not specifically. I remember that the jokes had to do with sex. All of them.

Q. I take it that you don't recall reading this, but that didn't enter into your consideration—

A. Yes, I know by looking at and reading like several words all the jokes had to do with sex, and were dirty jokes. They weren't non-sexual jokes. They added to the reason we prosecuted the magazine. That was one of the reasons that added to that.

Q. Because of the dirty jokes. Because they were jokes that deal with sex, you considered that prosecutable?

A. Yes, in relation to the rest of the magazine. Certainly I'm talking about obscenity. It has to have something to do with sex.

Q. Take this joke: "Hustler's definition of Peter Pan, a washbasin in a whorehouse."

Would you prosecute a joke like that on itself?

A. You mean if someone came up on the street and said that—

Q. Yes.

A. Well, if someone came up and said that you couldn't prosecute anyway.

Q. Well, suppose it just appeared in a book of jokes. That was the theme of all the jokes, and all the jokes were like that?

A. If all the jokes were like that, yes.

Q. Do you consider that hard-core pornography?

A. Could be.

Q. Do you think that would appeal to the average person's morbid or shameful interest in sex?

A. I think it is intended to.

Q. You think it is intended to?

A. Well, what is a whorehouse if not for shameful sex purposes?

Peter Pan, obviously, you're redefining Peter Pan to give it sexual overtones. That's why I think you gave it shameful and morbid—

Q. Well, define what you think is morbid or shameful sex?

A. Okay. Prurient interests has been defined as shameful or morbid interest in sex, or excretion, and I think that means to be ashamed of, or to make sex a part of conversation simply to do that and for no other purpose.

Q. Okay. Now, "The Vulva of the Dolls." This is a series of pictures of dolls with sexual organs and things of that sort.

In your opinion, under the Miller test that qualifies as hard-core pornography by itself?

A. Yes.

Q. And why is that?

A. Because all of them have to do with sexual activity. I mean, obviously, sexual activity.

Q. These pictures in your opinion appeal to the average person's morbid and shameful interest in sex?

A. Yes.

Q. All right. Now, the story on Lenny Schultz, "Blue Star on the Horizon."

Did you read that article?

A. I didn't read as much of that article as some of the others.

Q. Less than a fifth?

A. Yes, because it seemed to be about — not as much sexually oriented as the rest of the articles.

Q. Would that article, standing by itself, ever be a basis of prosecution as far as you are concerned; I wondered — you haven't read the article so I don't suppose you can make a judgment?

A. Well, maybe in the way it is written — well, it does have to do with Lenny's acts which are the crazy things he does which are aimed at sex since they, you know, they don't recreate his acts, and it only tells what he does, maybe some you could say — if he did it in a theater, and that was a newspaper review, it might not be prosecutable.

Q. The rest of these seem to be a completion of the other articles, and then there is "Honey Hooker" in the end.

Would you prosecute that by itself; a book of cartoons like that?

A. Yes.

Q. Why?

A. Because even though it is a cartoon, it shows, obviously, she's simulating sex acts and ejaculation.

Q. All right. Now, can you give us in kind of just one statement what the basis of your prosecuting Hustler was, in addition to the starting of the prosecution for the cartoon?

A. Because I feel that, taken as a whole, Hustler magazine is aimed at and attempts to and succeeds in portraying the stories and the pictures purely for a sexual purpose. Everything is oriented to — almost everything in the magazine, maybe 95 percent is oriented towards sex, and not towards boating or fishing or something. Therefore, I feel the way it does so, I feel it is kind of crass.

It doesn't discuss sex in a serious manner for any legal purposes. I think it is for prurient interests. I think their reason is to arouse someone's prurient interest and bring out the sexual attention to bear on the magazine rather than the literary attention.

I found them to contain many lewd exhibitions of the genitals, and I feel this is what the Supreme Court means when it says "What kind of actions can be contained."

I thought that the whole tone of the magazine wasn't a serious attempt at providing pictures for art's sake, or articles for literary sake.

That's my judgment.

Q. All right. Now, what you're doing then when you say "I thought the intent of the magazine," you are using a subjective standard rather than an objective standard?

A. Well, it's every person's — it's an objective standard for me to decide whether the average person in my community, the City of Cleveland, would apply the Miller test to find it obscene—

Q. That's subjective—

A. —objective.

Q. When you say you thought the intent of the magazine was, it's subjective, isn't it? You don't know what the intent was?

A. No, I read the intent — I infer what the intent is from what I read.

Q. And that's subjective?

A. Well, that's a subjective process.

Q. There isn't anyplace you can look in a magazine to find the intent, it's a subjective process?

A. Yes.

Q. Now, I take it you wouldn't have prosecuted the magazine if instead of having some of the other materials, if it was made up solely of pictures of women with full frontal nudity, you wouldn't have prosecuted the magazine solely on that basis, would you?

A. We may have.

Q. Well, could you say one way or the other?

A. Depending on what it looked like, and what the pictures showed. Certainly if you have a book with nothing but pictures of women with their legs spread, I imagine—

Q. But you never prosecuted the magazine like that before?

A. No, I'm not sure—

Q. Certainly in terms—

A. Like I said, the cases that come to trial are usually the ones that we actually take an in-depth look at by the time they get to me. Because, like I said, several of the cases that were thrown out, we never look at again.

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Q. Well, let's take a look at the cases that went through the prosecution, to a conclusion to a jury verdict.

You never prosecuted a magazine just for full frontal nudity and genitals fully exposed, did you?

A. No. We didn't do it in the magazine with the kids, and I'm almost positive we did with Screw—

Q. Well, Mr. Taylor, I mean, that's children. That involved different considerations, didn't it? You told us, you indicated earlier that if adults stood around in positions like that, you wouldn't have prosecuted?

A. Maybe not.

Q. If you take the magazine, and going back to my original question, if it contained nothing but full frontal nudity, no matter how closely the genitals were exposed, you had never prosecuted a magazine like that before?

A. We had never prosecuted a magazine like Hustler.

Q. Well, you had never prosecuted a magazine just that consisted of pictures of full frontal nudity, had you?

A. Well, Hustler isn't like that.

Q. Mr. Taylor, you're not answering my question. Please, I know you're a lawyer—

A. I'm not sure.

Q. All right. Not to your knowledge, in any event?

A. I think Screw magazine was prosecuted, and as I remember, it did not have any actual hard-core penetration shown.

Q. But is that something — do you still have that exhibit around; would that be part of the file?

A. I imagine it is either in the Court of Appeals, or the police have it. It may have been destroyed.

Q. If there were pictures in Screw magazine of men and women having intercourse, some pictures, then my question would stand. In taking the July 1976 issue as an example, if that consisted of full frontal nudity, with the genitals fully exposed, you had never, to your knowledge, ever prosecuted a magazine like that before?

A. Maybe not a magazine. I'm not sure because we had several of them—

Q. Only to your knowledge, the ones that you knew about; you never knew of any?

A. No, I don't think so.

Q. All right. Now, in the next question I have, to your knowledge, again, with the ones that you know about, you had never prosecuted a magazine that consisted solely of stories, just stories dealing with sex, and the printed word. As I recall your testimony, you had no recollection of prosecuting a magazine just with the printed word in it, had you?

A. That's correct.

Q. Okay. And you had never prosecuted a magazine that dealt solely with cartoons with the exception of one incident you mentioned of Fritz the Cat?

A. Yes. But I don't think we ever got Fritz the Cat because they never stayed in the Cleveland area—

Q. All right. Another question I have is that you never prosecuted a magazine that had solely film reviews or book reviews dealing with X-rated films or X-rated books?

A. I don't know of any.

Q. All right.

A. I don't know of any magazines that just have that.

Q. Well, you know of magazines that just contain articles of sex, sex digest, and magazines that deal with nothing but articles of sex with no pictures, illustrations; you know of some of—

A. I know I — I know the—

Q. Well, let me ask you this: Are you familiar with Club magazine?

A. Yes. Vaguely.

Q. Are you familiar with Penthouse?

A. Yes.

Q. Gallery?

A. Yes.

Q. Genesis?

A. Yes.

Q. Oui?

A. Yes.

Q. Playboy?

A. Yes.

Q. Cavalier?

A. Yes.

Q. Swank?

A. Yes.

Q. Stud?

A. Yes.

Q. Dude?

A. Yes.

Q. Now, those magazines are all sold in this community, aren't they?

A. Yes.

Q. As a matter of fact, let me ask you this: I take it that in the last two years, since April of 1973, because of the element of contemporary community standards that now apply in local community standards under Miller, you have tried to keep somewhat abreast of the community standards, haven't you?

A. Well, yes.

Q. I take it what you have done is from time to time, either through the police work or people bringing them into you, or your own independent investigation, tried to keep abreast of the type of magazines and books sold in the community—

A. I'm aware of what is being sold, pretty much.

Q. Pretty much, and what is being shown in peep shows from your work—

A. Yes.

Q. And the motion picture houses?

A. Yes.

Q. Okay. Now, you've indicated to us that you know that Penthouse, Club, Gallery, Genesis, Oui, Playboy, Stud, Cavalier, Dude — Stud, are distributed in this area, and are sold and purchased here?

A. Yes.

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Q. Now, you've never prosecuted, in the years that you have been in charge of the prosecutions, you have never prosecuted any of those magazines, have you?

A. Not as of yet.

Q. Okay. And Hustler magazine is the first magazine of national distribution of the type we're discussing here that you have prosecuted, haven't you, isn't that so?

A. It's the first one that we know of that has a second class mailing privilege, and is sold nationwide.

Q. Well, you know these other magazines are sold nationwide?

A. We know — you mean, the ones you named?

Q. Yes.

A. Yes. We don't know whether the other magazines are nationwide or not.

Q. All right. In other words, what you are saying is that you know that the magazines I read off, and just to be careful here, Penthouse, Club, Gallery, Genesis, Oui, Playboy, Stud, Cavalier, Swank and a number of others that I haven't named, of that genera, or of that style, are sold nationwide?

A. Yes, that's right, I know.

Q. Now, have you under consideration right now, and by that I mean under investigation, any of the magazines that I have read off to you?

A. Well, "under investigation," yes. We've got several issues of several of them—

Q. Of magazines like Penthouse, Playboy, Oui—

A. Yes.

Q. And how long have they been under investigation?

A. Since last summer.

Q. And no prosecution has been started yet?

A. No.

Q. Been initiated?

A. Right.

Q. All right. And is that unusual to have a magazine under investigation for eight months without initiating an investigation, in your experience here as a prosecutor?

A. Well, it's unusual — this is the first time it has happened because we're waiting for this case.

Q. Is it your intentions, that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud—

A. I don't know. That decision, I can't make alone either.

Q. But I take it it's been contemplated?

A. It's being discussed.

Q. Okay. Now Hustler follows the same format, does it not, and I'm talking and I want to be very specific in terms of magazines; and if you don't mind, I'd like to designate—

THE COURT: Just a minute, Mr. Fahringer.

We'll go off the record.

(Discussion had off the record.)

BY MR. FAHRINGER:

Q. Could I use the term, Mr. Taylor, of the so-called men magazines or adult magazines to class so that we'll know what we're talking about between the two of us?

A. Yes.

Q. In terms of men-adult magazines — incidentally, would it be fair to say from your experience, there is on the market, in that category, and I named the leading ones, but anywhere from 75 to 100 different titles of these magazines?

A. I don't think I have seen that many.

Q. Would it be fair to say between 50 and 75?

A. No. I think the ones that you named are all the ones that I can think of. I have — you know, those have been brought to my attention because the defense attorneys bring them in for our criminal cases. They're bought at the airport, I know, but I don't know about all the rest. I don't know about the 50—

Q. You don't know the total?

A. Well, in the bookstores, magazine shops that I have been in, and the convenient type food marts, stop-n-shops and shopping malls, I don't see where they would have a big enough rack to have 50 different kinds.

Q. Well, I'm not saying that all these stores can. But if I told you that in Cincinnati, the wholesaler there that handles, you know, all the magazines, and he handles Reader's Digest, but he had indicated to me that there is anywhere from 50 to 75 of these men magazines that he handles; and he didn't handle all of them. Would you have a reason to dispute that?

A. I wouldn't dispute. I wouldn't be able to—

Q. Say that is so here in Cleveland.

Now in terms of this category of magazine, would it be fair to say all of these magazines, and I'm not — there may be some that only deal with men or with women, would it be fair to say that these men's magazines generally show women in the nude with the genitals exposed?

A. Yes.

Q. And that they contain stories dealing with sex?

A. Yes.

Q. And cartoons?

A. Yes.

Q. Letters to the editor?

A. Yes.

Q. And the so-called advise and consent where the readers write in about sexual problems and they are answered?

A. Yes.

Q. So that the Hustler magazine, in terms of format, follows the format of these other magazines?

A. Yes.

Q. Now, would it also be fair to say that in terms of comparing Hustler with these other magazines, some of these other magazines, now magazines such as Club, I think, Gallery, are showing scenes of simulated sexual intercourse; have you seen any of those at all—

A. Yes.

Q. —have they been brought to your attention?

A. Yes.

Q. Where there is a picture of a guy and a girl meeting and going to a hotel room and then it appears as though they are having intercourse, although there is no explicit sex?

A. Yes.

Q. Has it come to your attention that many of these magazines, in this category that we have been discussing, have

articles on bestiality, homosexuality, pedophilia, necrophilia and all of these so-called sexual aberrations?

A. Yes.

Q. Now, has it also been your experience, in your history as a person who has been involved in legal obscenity prosecutions, that in magazines like Club, and Penthouse, and Gallery, and Genesis, and Stud, and Cavalier and Swank, the pictures of the girls do show the vagina spread, as it were?

A. Yes.

Q. Now, wouldn't it be true then that, in terms of Hustler, as compared to many of these other magazines, and to be perfectly candid, Playboy, the pictures of the girls there, they for the most part show pubic hair and there isn't an awful lot of the vagina spread apart, so far, to date, at least; but in terms of these other magazines, so exclude Playboy, would it be fair to say that those magazines are comparable to Hustler?

A. That's right — I know I haven't seen all the issues.

Q. In terms of your experience, they would be?

A. The ones that I have seen are pretty much alike.

Q. Now, isn't it true that you would be hard-put, in terms of more explicit magazines in this category, like for instance Penthouse, Club, Gallery, Genesis, Stud, Cavalier — wouldn't you be hard-put to point out differences between those magazines and Hustler?

A. Well, you could find a lot of differences.

Q. Like what?

A. Certainly the kinds of stories they have in Hustler portraying the vagina or vulva more prominently than a lot of magazines that I have seen. Certainly Hustler's jokes are much more shocking, and you know, they have less thought process.

And are more grossly sexually orientated than any other jokes I have seen.

So I think that's a difference.

Q. Let me ask you this: How about — have you seen Club; how about the magazine where they show these simulated sexual intercourses and what the public would call "soft-core." Certainly, in terms of pictures, that would be stronger than Hustler?

A. Maybe in terms of pictures. As far as sex — maybe not as far as the vagina. I don't know — you know.

Q. Have you seen the pictures—

A. —around a whole lot different.

Q. The pictures are pretty much the same, aren't they?

A. Pretty much.

Q. All right. In terms of the articles, I take it you're not in a position to indicate, and I'm talking about the articles, like "Sex Play" and the interviews and that certainly is no different than, in degree or otherwise, than Penthouse, Club, Genesis, and Swank and Cavalier?

A. Only that I think — the few stories I have read in Penthouse, and I have never read any in any of the other magazines; but the few stories I have seen in Penthouse seem to be a little better written as far as literary words—

Q. Not in terms of content?

A. They still describe the same thing, and Hustler just doesn't — it's a lower mentality basis, or at least a lower level of grammar.

Q. But you are not saying that with Swank, or Stud, or with Genesis or Gallery, the lesser magazines?

Bruce A. Taylor by Mr. Fahringer

A. Not as far as I know. I don't know that much about the rest of them.

Q. Now, in terms of the cartoons, and again I'm not pressing you on this, have you seen the cartoons in the magazines — and I realize there are degrees. I normally think of in terms of circulation, Playboy is number one, Penthouse is number two, and then I believe comes Club. But when you get down to Gallery and Genesis, are you able to say the cartoons in Hustler are more tasteless than those in Genesis, Gallery, Stud, Cavalier and Swank?

A. I don't know. I haven't — I don't know. I don't think I ever looked through a Stud; and I think I have seen a Swank. I know I have seen a Penthouse, and I know I have seen Genesis and Gallery.

I don't remember many cartoons of the type that I have seen in Hustler.

Q. Okay. In terms of the cartoon series in the back, have you seen "Wicked Wanda" in Penthouse?

A. Yes.

Q. And have you seen "Annie Fannie" in Playboy?

A. Yes.

Q. And are they comparable to "Honey Hooker" in terms of, at least, being a four, five page cartoon series with drawings?

A. They're about the same size as far as length.

Q. And in terms of the theme of the stories where a girl gets herself in some way imperiled in a crazy, bizarre sexual episode, and is then ultimately extricated, is the theme just about the same?

A. No.

Q. You don't think so?

A. I don't think "Annie Fannie" comes anywhere near close to "Wanda"—

Q. I mean "Honey Hooker"?

A. "Honey Hooker"—

Q. What about "Wicked Wanda"?

A. Well, "Wicked Wanda" doesn't seem to have very much sex in it at all.

Q. Well, that deals with a great deal of lesbianism?

A. Obviously, she's got a girlfriend, and they're laying around in the nude. You know they must be lovers; but they don't show that like it does in "Honey Hooker"; and "Annie Fannie" never, as far as I know, showed any sex.

Q. All right. Now, finally, let me ask you this: Do you have any written records of your own, and we're going to talk to the police officer in a moment, relating at all to the prosecution of this case?

A. Just my own notes where I made phone calls to people, people to call, and that kind of thing.

Q. In terms of witnesses and things of that sort?

A. Yes.

Q. Would any of those relate, at all, to your judgment process in deciding whether or not—

A. Nothing was ever written down at all.

Q. How about anything written on a cartoon, and the contents of the cartoon?

A. We — I never made notes on the—

Q. Contents of the magazine?

A. Never.

Q. All right.

MR. FAHRINGER: Judge, I think that concludes my examination.

THE COURT: One question. I think you have discussed one issue.

MR. FAHRINGER: Yes.

THE COURT: Mr. Taylor, if the questions were asked of you concerning the other issue that is involved, would your answers be more or less the same?

THE WITNESS: Yes.

MR. FAHRINGER: Thank you, Judge. I appreciate that.

MR. CAMBRIA: Judge, I just have a few questions—

THE COURT: Mr. Cambria, can you wait a minute, please?

I think we should take a short recess.

(Thereupon a recess was had.)

MR. CAMBRIA: Your Honor, I only have a few questions.

BRUCE A. TAYLOR BY MR. CAMBRIA

EXAMINATION OF BRUCE A. TAYLOR

BY MR. CAMBRIA:

Q. Mr. Taylor, did you ever directly or indirectly communicate to any distributors that they should not sell Hustler magazine?

A. No.

Q. The distributor—

A. There's only one distributor—

Q. Klein?

A. Klein. Well, now there's more.

Q. All right. Did you make any communications to him directly or indirectly?

A. I wrote him a letter.

THE COURT: Just one second. We're here on a motion to dismiss on discriminatory prosecution, for selective prosecution—

MR. CAMBRIA: That's correct.

THE COURT: What basis—

MR. CAMBRIA: Well, Your Honor—

THE COURT: Are the basis of the questions?

MR. CAMBRIA: I'm trying to focus in on the focus of their prosecution. They are only interested in one magazine, and I think if I can go on, Your Honor, here, I can indicate to you what I'm looking for.

THE COURT: All right. Go ahead.

BY MR. CAMBRIA:

Q. Now, what were you about to say about Klein News?

A. We talked to Klein News.

We, basically, told them of our intentions to charge Hustler. When we did decide to charge Hustler they indicated that they would probably stop selling or stop distributing it if we did charge them. They said to let them know if we did charge them, and when that would be. And we did write a letter.

Q. You initiated that, and wrote them a letter, is that correct, indicating that you intended to prosecute Hustler?

A. Yes.

Q. All right. Did you indicate that you were intending to prosecute any of the other nationally distributed magazines that we have mentioned here this morning?

A. No.

Q. Just Hustler, and do you have that letter?

A. I think so.

Q. Okay.

THE COURT: I want to ask you a question, Mr. Taylor.

If you have the letter, they can ask you in discovery.

BY MR. CAMBRIA:

Q. Mr. Taylor, let me ask you this: You began an injunction proceeding, didn't you, against Hustler?

A. Yes.

Q. Did you begin one against any other nationally distributed magazine, men's magazine?

A. No.

Bruce A. Taylor by Mr. Cambria

Q. Now, you said earlier, I believe, that you had some of the other magazines under investigation.

Now, what did you mean by "investigation"; did you mean you knew they existed or—

A. Yes.

Q. Had you done anything?

A. No. We looked at other magazines after we looked at Hustler.

Q. In other words, you had initiated the prosecution of Hustler, and then you looked at some other magazines?

A. Yes.

Q. When did you look at the other magazines in reference to the time you prosecuted Hustler?

A. Well, certainly we were aware there were other magazines—

Q. Was it — excuse me. Maybe I can make it a little easier.

Was it like a month later, two months later or what?

A. We never, actually went into a formal — bring us some other magazine and we'll make a file of this.

We knew other magazines existed and they were discussed.

Q. So in other words, when you say you had other magazines under investigation, you mean you knew they existed?

A. Yes.

Q. You didn't take any formal steps towards working up a prosecution as to the other magazines?

A. That's correct.

Q. You didn't review any of them with the specific thought in mind of prosecuting them, is that right?

Bruce A. Taylor by Mr. Cambria

A. No, but we did view some of them with the specific intent of seeking an injunction.

Q. All right. This was after the prosecution was initiated against Hustler?

A. Yes.

Q. And was it after the present motion was filed pointing out discriminatory prosecution?

A. No, it was the same time we had asked for an injunction against the September Hustler.

Q. Okay. Did you ever open any criminal files, or prosecution-type files against these other magazines?

A. No. The police never seized any, et cetera, for the purpose of doing that.

Q. All right. Did you ever initiate any of the other injunctions against any other magazines?

A. No.

Q. And what specific issues, if you can remember, of the other magazines did you review for the purpose of an injunction?

A. We were concentrating on an injunction that would include Hustler and probably any number of the other five or six. We were going to think of five or six, maybe a dozen, to include Penthouse, Genesis, Gallery, Oui, Knave, Cavalier — I don't know. Several.

Q. Are you telling me you were contemplating doing it, or did you actually go out and acquire these other issues and look at them, and then just settle on Hustler?

A. Well, we had seen these other magazines which had been introduced in our trials by defenses. We knew, basically, what they were.

Bruce A. Taylor by Mr. Cambria

Q. All right. The question is still that at the time you made the decision on Hustler, as far as the injunction, did you actually look at other magazines for the same month as the Hustler magazine that you brought the injunction against?

A. Yes, we had — the police had a couple of issues of Penthouse and there were several magazines like Knave, Cavalier, Genesis, Gallery — I don't remember.

Q. All right. But you didn't proceed against them?

A. We had Knave specifically, and what's the other one — there is one other one. I think Swank, I'm not sure.

Q. Okay. I take it now that there are no active files that you have directed towards a prosecution of these other magazines that you know of?

A. We haven't started any, no.

Q. All right. Now, I think you have indicated in your brief here that you selected the defendants in this case by scanning the masthead, is that correct?

A. Yes. They're listed in the first page.

Q. And for instance, let's take Jimmy Flynt. Was there any investigation aside from looking at the masthead in arriving at your decision to prosecute him?

A. Yes.

Q. All right. What was that?

A. There were other investigations done by the police into his position in the company, and his position of ownership and his job, you know, involvement.

Q. All right. I take it that you interviewed some people regarding that?

A. Well, the police checked into things, and we also talked to other law enforcement agencies.

Q. And you talked to the law enforcement agency in Hamilton County, Ohio?

A. I talked to him, Mr. Leis and Mr. Cartolano, his investigator, in September. So that was afterwards.

Q. Now, when you did the investigation, let's say as to Jimmy Flynt, was this after the charges were brought against Jimmy Flynt in northeast—

A. Done before—

Q. Prior?

A. Some before, some after.

Q. How about Althea Leasure? Did you do any independent investigation regarding her aside from the masthead?

A. Yes.

Q. And was this again by questioning people?

A. Yes.

Q. Okay.

A. You know, reading printed material and things. Documents, interviews.

Q. And did you make a record, report of this?

A. Well, I have, you know, notes of who I talked to, and to certain different notes where I can find things again.

Q. Okay. This was done all prior to the time that the prosecution was brought in this case?

A. Some before, some after. Much of it after.

Q. Much of it after?

A. Much of the filling in blanks, specifically, dates, times, things like that, afterwards.

Q. All right. Now, let me ask you this: When you made your decision in this case, did you make the decision or did you, in effect, approve a decision made by the police to prosecute?

A. Well, the police came with the request and asked me whether or not it was possible to charge the officers of a corporation in Columbus for something that was done in Cleveland. I indicated, "yes."

Then we decided to make the investigation to decide how we could do it.

Q. Now, when you were making your decision as to whether or not there was reason to prosecute the magazine, I take it that you had to operate with your own definition of what constituted serious, is that correct?

A. Yes.

Q. And you employed that in reviewing this issue to make the determination, is that right?

A. Yes.

Q. All right. What was your definition that you employed?

A. Well, I think our community thinks of serious values as it relates to scientific, educational or political as being an attempt to teach someone something with a purpose of enlightening a person on something they don't already know; or correcting an aberration that may have been read to them, or like scientific, to point out something for a serious purpose. Meaning to give you some knowledge you didn't have before.

Q. Instructional. Educational or instructional, is that more or less your definition?

A. Yes.

Bruce A. Taylor by Mr. Cambria

Q. All right. Now, when you say our community or your community, what did you do, if anything, to ascertain what the community standards was?

A. Well, my experience is mainly the way I read the community. Certainly I can't make all the decisions. I didn't go out and ask everybody what they thought—

Q. What particular factors played a part in your consideration, what community — it wasn't your—

THE COURT: Mr. Cambria, aren't you now going into the elements constituting legal obscenity as defined by the Miller guidelines or something of that sort, that you should better leave to a trial of the facts?

MR. CAMBRIA: What I'm trying to do, Your Honor, we went through the prurient interests parts of it, and the actual definition—

THE COURT: Perhaps we went pretty far afield. Mr. Taylor, not having someone here with him to perhaps voice some objection or something of that sort, has spoken for the record quite extensively.

I think the sole question here is whether or not the State entered into some selective prosecution, and not whether or not Mr. Taylor himself believes that this particular magazine, or Oui or Genesis or whatever it is, these other magazines are as obscene or more obscene or equally obscene or whatever it is.

MR. CAMBRIA: Well, with regard to this, the only thing I'm trying to develop since he apparently, made the decision, and he had to make that, segregating one magazine from another magazine, I was trying to arrive just to what the basis for — what his decision or distinction was. That's why I was asking the questions.

THE COURT: All right, sir. Go ahead.

Bruce A. Taylor by Mr. Cambria

BY MR. CAMBRIA:

Q. Let me ask you this: You said something on Mr. Fahringer's cross, and he asked you whether or not you were going to prosecute all the rest of the magazines, and you said you couldn't make that decision. Do you recall that?

A. Yes.

Q. But are you telling us here today you could and did make the decision regarding Hustler magazine?

A. Yes. I mean, it's not my decision only because the police play a part, and the chief prosecutor plays a part; and certainly, the events play a part in it.

Q. Then I take it with regard to the other magazines, the only thing you have to do is consult with the police and consult with the chief prosecutor—

A. And the law department—

Q. As to whether or not — the director of law?

A. Yes.

Q. The same thing that you did here, is that correct?

A. Yes.

Q. I mean, it wouldn't be any different procedure. It wouldn't be out of your hands, so to speak, with the same steps you followed in connection with making the decision in this case?

A. Yes. Except that Hustler — this prosecution of Hustler was pretty much started as an effort between the police and myself; and it caused such a, you know, large scale publicity, if we were to go against Hustler or any other magazine, I'm sure you would have to look at the effects and certainly find out what happened in this case. There are a lot of things that would take part in another consideration taking into consideration with Hustler because it was our first.

Bruce A. Taylor by Mr. Cambria

Q. In other words, if you were to make a decision as to whether or not you would prosecute some of these other magazines, then the public concern or publicity factor would play a part; it that what you are saying?

A. My decision wouldn't be any different. I would be willing to prosecute, anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case.

Q. In other words, before you would make a decision to go against any of these other magazines, you would want to consider all these people that may play a part in it, and all the publicity, perhaps, that may be involved in it, and perhaps public reaction and a lot of other things?

A. Certainly the public reaction would have to do with whether they felt it was obscene. We would have to judge whether they felt the magazine was obscene by what happens. We had to judge community standards again, maybe.

Q. All right.

A. And we're not concerned whether there's going to be more publicity or less publicity.

Q. Well, you said, didn't you, just a few seconds ago, that because of all the publicity that was attached to this case, you have to discuss it with some other people as to whether or not you were to prosecute these other magazines, you said that?

A. Certainly, because one of the considerations is my time, and how much time I take away from one prosecution we can't afford to spend. The City might not be able to afford to have me doing nothing but these magazines—

Q. What does publicity have to do with it?

A. Well, the more publicity and the more time it takes, the more drawn out the cases are. Most of our cases don't take anywhere near this much time.

THE COURT: The court disagrees with that statement. I don't think — I hope the publicity, whatever it is, has not drawn out this case. This case has been heard on the motions as time will permit, and as the various parties have been available.

This court has been available all the time and the publicity angle of it certainly has not been a factor in the prosecuting of this case. At least as far as the court is concerned.

The time that it has taken to hear these motions has been based upon the availability of the attorneys, and the time schedules which they have.

So I just wanted to set the record straight on that point.

BY MR. CAMBRIA:

Q. You'd agree with that, Mr. Taylor?

A. What I mean is that the publicity plays a part in gauging what the community feels about what we're doing.

Q. So in other words, if you're going to make this future determination regarding these other magazines, you're going to be looking at other things other than just what the content of the magazine is; you're going to be looking to what is going on around you, and how people react to the prosecution?

A. Certainly, that is a thing that has already taken place. It's already been considered.

Q. But you did indicate that would affect your future decision regarding these other magazines?

A. Oh, certainly.

THE COURT: Mr. Taylor, are you sitting here telling this court that if someone makes a determination that there is a violation of the criminal section of the statute,

or the City of Cleveland, that you first determine what the public feels about it before you proceed to—

THE WITNESS: What I meant is that if we get a jury verdict of not guilty that, to me, is an indication or might be an indication of whether we were right in gauging whether it is obscene. That certainly would have to be taken into consideration.

THE COURT: You're talking about a judicial trial. You're not talking about publicity. You're not talking about—

THE WITNESS: No, the newspapers now—

THE COURT: Well, that's the indication that the record is going to indicate.

You're talking about a judicial trial. So the result after a judicial trial may have an influence on how you may prosecute, and not what the publicity is that might be involved in it?

THE WITNESS: Yes.

THE COURT: All right. I just wanted to satisfy—

MR. CAMBRIA: You didn't say that initially, did you; you just added—

THE COURT: I think he meant that, Mr. Cambria.

THE WITNESS: When you talk about the considerations to prosecute, there are always, you know, several considerations of — the prosecutor always has to determine based on time which fact situations you can present to trial.

BY MR. CAMBRIA:

Q. All right. Let me ask you this: In indicating all these other magazines that we have talked about aside from Hustler, I take it that they are sold throughout the community, are they not?

A. As far as we know, yes.

Q. Not just through the airport, as you indicated, but throughout the entire community?

A. It's been indicated — the testimony has been to that effect in cases. The police know that, I didn't.

Q. Have you, yourself, had an occasion to visit some of the local drugstores or whatever, and seen copies of magazines displayed next to Hustler prior to this investigation?

A. Yes.

Q. The same kind of book, Penthouse, Oui and all of these others displayed in the same place and in the same manner?

A. Yes.

Q. And that was the state of facts at the time you brought the prosecution in this case that they were all, apparently, up there in the same way and sold in the same manner?

A. Yes, as far as we know.

Although there was one exception to Hustler, and Hustler was barred for sale at the airport. I imagine, at least a year ago or something. That was done by Mr. Putka, who is the commissioner of ports and harbors.

Q. Have you had any opportunity to determine if he banned any other magazines from being sold there, let's say, in the last ten years?

A. I don't know.

Q. So in other words, the Hustler situation came to your attention, apparently you are involved in it here, and it came to your attention, is that correct?

A. Yes.

Q. But you don't know whether or not any other ones have been taken down from the airport, from the stands?

A. No.

Q. Now—

THE COURT: Mr. Taylor, as a practical matter, do you not know whether there has been any other magazines banned at the airport?

THE WITNESS: I don't know.

THE COURT: Have you had any testimony in previous trials?

THE WITNESS: I know that Penthouse and Gallery and most of those other magazines are still being sold — still being purchased by the defense.

I know Mr. Putka, when he testified once, said he told Hustler not to be sold there and he forbid Hustler from there, you know.

I don't know what kinds of other magazines they may have reviewed in the past not to allow there.

Most of the magazines he's talking about are still for sale there.

THE COURT: What his question is: From your experience, do you know for a fact that Hustler is supposedly banned from the airport, or any of these other magazines—

THE WITNESS: There's all kinds of thinking. I have mentioned—

MR. CAMBRIA: You don't know whether or not these magazines—

THE WITNESS: Certainly, most of them haven't been banned.

BY MR. CAMBRIA:

Q. Do you know whether or not certain issues of these magazines have ever been banned; do you ever monitor them that consistently?

A. No.

Q. You don't know?

A. The police have been doing the investigations—

Q. You personally—

A. —a year ago.

Q. You personally, your own personal knowledge, do you know? Not by the police.

A. No. I don't.

Q. All right.

MR. CAMBRIA: All right. I have nothing else at this time, Your Honor.

THE WITNESS: Judge, I have some questions I would like to answer by myself, if I may be permitted?

THE COURT: I think Mr. Fahringer called you as a witness—

MR. FAHRINGER: Yes, I did, Judge.

THE COURT: Do you want him to make a statement—

MR. FAHRINGER: Judge, I would think, in all fairness, if he had a lawyer he could ask him questions. I don't think it would be right for me to object.

THE COURT: All right, sir.

THE WITNESS: There is one instance that I know of where the police were called out to the airport and made an investigation of several kinds of magazines that were sold at the airport including Penthouse, Genesis and Cavalier.

The result of that investigation was to require the airport newsstands to remove all men's magazines, and to move them to separate sections and cover up the covers so that you couldn't see them unless you were an adult. You could just see the titles and, I think, they did this with all the magazines.

I don't know if this was before or after they banned Hustler, but as far as I know it is still in effect because they still can't show them out there.

Another question, if you were to ask me or if I were to ask me, what were some of the reasons for prosecuting Hustler.

I would have to first say that after it was brought to our attention, maybe because of the cartoons and that's the only thing the people mentioned on the phone, it didn't matter. I had to review the magazine and the judge had to review the magazine as a whole. And another consideration has to be since we only have misdemeanor jurisdiction, we can only serve warrants from our Municipal Court in the State of Ohio. If we were going to prosecute Penthouse magazine, we wouldn't be able to prosecute the owners or the publishers of the magazine because we don't have any extradition power.

BRUCE A. TAYLOR BY MR. FAHRINGER

Larry Flynt and his brother and now, his wife, reside and operate from Columbus, Ohio, which is in our jurisdiction. We can arrest them, and that was one of the major considerations to going against Hustler instead of something else.

If we were going to enter into this field, we had to decide how we were going to do it. Certainly we can arrest Hustler magazine officers because of the misdemeanor warrants issued from Cleveland can be served in Columbus. Misdemeanor warrants cannot be served in Chicago or London. That's another consideration for the reason we prosecuted Hustler magazine in the first place—

MR. FAHRINGER: Your Honor, I have just a couple of questions on that.

FURTHER EXAMINATION OF BRUCE A. TAYLOR

BY MR. FAHRINGER:

Q. Mr. Taylor, first of all, you can prosecute any magazine because we're talking about something that is claimed to be obscene.

You can prosecute any magazine that is sold in this county by prosecuting either the retailer or the distributor, can't you?

A. That's correct.

Q. And in the past you have five hundred and some cases and a number of those magazines as far as you know, may have been distributed in other parts of the country, isn't that so?

A. Yes.

Q. And you prosecuted them here?

A. Yes.

Bruce A. Taylor by Mr. Fahringer

Q. And isn't it also true that in some of those cases as far as you know the operator, the publisher of the magazine might well have been out of state?

A. Yes.

Q. And your motivation for prosecuting those magazines was that the magazine was obscene, and your ambition was, because the crime was being committed in — is it Cuyahoga County?

A. Yes.

Q. —Cuyahoga County, you brought the prosecution, isn't that true?

A. Yes. We had hoped also to prosecute the people that sell it directly, usually.

Q. Now, are you also familiar with the fact — of course you can extradite from out of state under the uniform extradition contract between this state and other states?

A. Well, we can't serve a misdemeanor warrant. We can't bring somebody back here unless it is a felony case. We have no jurisdiction to try a felony case.

Q. Well, what I'm saying is that, are you saying that you can't, in the State of Ohio, you cannot — I realize this involves the laws of other states, but you can extradite on a misdemeanor, can't you?

A. I couldn't issue a warrant for pandering obscenity and have the police drag someone here from New York City.

Q. No. I'm suggesting this: What you can do is initiate a warrant in this community, either for a felony or misdemeanor, and then depending upon the laws of the other state, you can, by extradition proceedings, have that person brought back to Ohio without going outside the state. You know that, don't you?

A. I don't think I can do that for misdemeanors. I think just for felonies. Our governor would not entertain an extradition for anything other than felonies.

Q. Do you know that depends on the laws of the state; in other words, in some states they will honor a misdemeanor warrant for extradition, and other states will not.

A. Yes, but it's not common practice for us to do that.

Q. You're not saying it can't be done?

A. Not that I know of.

Q. Okay. All I wanted to do is make the record clear. As far as you know, you have never investigated, have you?

A. No.

Q. You have never investigated that if I initiated a prosecution here, a misdemeanor or otherwise, for Penthouse or for Playboy, you have not investigated whether the State of Illinois, or the State of Michigan or the State of New York would honor an application for extradition. You've never investigated that?

A. As far as I know, they'll only entertain that for a felony case. But that's only as far as I know. I never dealt with the law to need it.

Q. Now, you've never investigated as far as New York or Illinois, have you?

A. No.

MR. CAMBRIA: Just a couple of questions, if I may, Your Honor?

BRUCE A. TAYLOR BY MR. CAMBRIA

FURTHER EXAMINATION OF BRUCE A. TAYLOR

BY MR. CAMBRIA:

Q. The police involved here in this literature squad, they don't just work for you, they're available to any people, the county prosecutor as well as the municipal prosecutor, aren't they?

A. Oh, sure.

Q. And there wouldn't be anything to prevent them, to your knowledge, from taking any investigation which might require extradition to the county prosecutor so he could extradite them as opposed to you?

A. Yes. Because the county prosecutor can't unless he's going to go the ways that they did in Cincinnati, to charge organized crime. Only a second offense can be a felony—

Q. The county prosecutor can—

A. He has misdemeanor jurisdiction, but he has never chosen to exercise it in the pandering area.

Q. So you wouldn't have any idea as to whether — first of all, you would agree with me that a second conviction constitutes a felony?

A. Yes.

Q. And do you have any personal knowledge as to whether or not perhaps Swank or Club or one of these other magazines has been convicted once?

A. No.

Q. You don't know that?

A. No.

Bruce A. Taylor by Mr. Cambria

Q. So in other words, you can't rule out, at least based on your knowledge, that they had a conviction, and therefore, the second would be a felony; and the county prosecutor could extradite them in here?

A. It would have to be a conviction in Ohio.

Q. I understand that. I understand that. You can't rule that out because you don't know, is that right?

A. That's correct.

Q. But the point is this, you didn't make any attempts to refer the matter to the county prosecutor to have them investigate as to whether or not they could extradite somebody here?

A. Certainly not.

Q. All right—

A. It's not normal procedure.

MR. CAMBRIA: No further questions.

THE WITNESS: I'd like to explain to the court that when we decided whether or not to prosecute Hustler magazine, and in deciding who to prosecute, since we felt that a nationwide second class mailing privilege magazine had heretofore had not been the subject of day-to-day litigation, we felt it might be unfair to pick as our first target some man who has been selling, like everybody else, has been selling it for years; and we felt the people who should be responsible were the people who make the magazine. That's why we did not arrest anyone in the Cleveland area, and arrested Larry Flynt and his officers.

MR. FAHRINGER: Of course, that would attract more public attention to it also?

THE WITNESS: Yes, but I didn't know who Larry Flynt was before I issued the warrant. I never heard of him before.

MR. FAHRINGER: All right.

MR. CAMBRIA: Well, have you ever heard of Hustler magazine and heard about the indictment in Cincinnati which was about a year prior to your indictment?

THE WITNESS: We found about the Cincinnati indictment after we had charged, and then I found out that it was a long time before. I didn't know anything about that.

MR. CAMBRIA: You had no communication with Simon Leis?

THE WITNESS: No.

MR. CAMBRIA: How about the police officers as opposed to you, if you know?

THE WITNESS: As far as I know, they didn't know anything about it either. They treated it as a first impression also.

MR. CAMBRIA: To your knowledge?

THE WITNESS: Yes.

MR. CAMBRIA: Thank you.

MR. FAHRINGER: Your Honor, if we could just have Mr. Nemeckay. I don't think I will be long with him.

THE COURT: Sure.

STEVEN NEMECKAY BY MR. FAHRINGER

THEREUPON, the defendants, to further maintain the issues on their part to be maintained, called as a witness STEVEN NEMECKAY, of lawful age, who, having been first duly sworn, was examined and testified as follows:

EXAMINATION OF STEVEN NEMECKAY

BY MR. FAHRINGER:

Q. Mr. Nemeckay, am I pronouncing your name correctly?

A. Nemeckay.

Q. Nemeckay. Would you tell me a little bit about your occupation, where you are employed?

A. The City of Cleveland Police Department, Bureau of Inspection, Special Investigations Unit on the obscenity detail.

Q. How long have you been on detail?

A. Approximately four years.

Q. Were you responsible for the purchase of two magazines, one entitled Hustler, July 1976, and the other, Hustler, August, 1976?

A. Yes, sir.

Q. I show you — we're not marking these, Officer, but they're deemed to be marked Exhibits A and B, July, 1976 and August, 1976, does that bear your marking?

A. Yes.

Q. All right. Incidentally, there is a cellophane bag here, were these magazines here wrapped in some sort of cellophane when you purchased them; it was with — it was inside the envelope?

A. Are there two of them?

MR. CAMBRIA: Yes.

THE WITNESS: One in each bag?

MR. CAMBRIA: Yes.

MR. TAYLOR: I think there are—

MR. FAHRINGER: No, there's one—

THE WITNESS: Yes, then there was one on each lower half of the magazine.

BY MR. FAHRINGER:

Q. In other words, so that we have it straight, this cellophane wrapper would go across the bottom of the magazine so it would cover the — like that?

A. That's the way.

Q. And that was on both of them, if they were both in bags?

A. Yes, sir.

Q. Now, incidentally, would you indicate to us from your handwriting where you purchased both the magazines, the July and August magazines?

A. The July magazine was purchased at 1834 East Sixth Street, and the August edition was purchased at 1930 East Sixth Street.

Q. Could you describe those places; give us the names of those places?

A. 1834 East Sixth Street is Sam Klein's Cigar Company.

Q. And the other one?

A. Erieview News.

Q. All right. Now, are these places that sell other magazines and other publications?

A. Yes, sir.

Q. Incidentally, did you purchase Hustler magazine as a result of instructions that were given to you?

A. Yes, sir.

Q. All right. Who gave you those instructions?

A. The prosecutor.

Q. Mr. Taylor?

A. Yes, sir.

Q. In other words, he indicated to you to go out and buy the July and August issues of Hustler?

A. Yes, sir.

Q. Did he indicate where you should go?

A. No, sir.

Q. He left it to your discretion?

A. Yes.

Q. Did he indicate that you should purchase any other magazines other than Hustler in connection with this investigation?

A. No, sir.

Q. All right. So you were told to buy, specifically, the July and August issues of Hustler, you weren't told where to go to get them?

A. That's correct.

Q. All right. Did you go in other establishments to see whether or not Hustler was sold other than those two?

A. Yes. We checked several locations in the downtown area.

Steven Nemeckay by Mr. Fahringer

Q. Did you find that there were other places that were selling Hustler?

A. No, sir, there were not.

Q. So these were the only two locations that you went to?

A. The immediate downtown area, yes, sir.

Q. Now, incidentally, how many establishments did you check, if you know?

A. At least a half-dozen.

Q. And you only checked the immediate downtown area?

A. Yes, sir.

Q. Now, when you went into those two establishments that you described, did you also notice on sale other men's magazines such as Playboy, Club, Gallery, Genesis, Oui, Cavalier and Swank?

A. There were other magazines.

Q. You're not certain of what the titles were, I take it?

A. No, sir.

Q. Do you know Playboy magazine?

A. Yes.

Q. You are familiar with it?

A. Yes, sir.

Q. Penthouse?

A. Yes, sir.

Q. Do you know Club magazine?

A. Yes, sir.

Q. Gallery?

A. Yes, sir.

Q. Genesis?

A. Yes, sir.

Q. Oui?

A. Yes, sir.

Q. Cavalier?

A. Yes, sir.

Q. Swank?

A. No, sir, I don't know Swank.

Q. You don't know Swank. Do you know other magazines that I haven't mentioned that are so-called men's magazines that deal with women in the nude and things of that sort?

A. I just know the titles.

Q. All right. Can you tell me when you went into these two establishments, if you recall whether or not Playboy was on sale at either of those two?

A. I believe it was.

Q. All right. What about Penthouse?

A. I don't recall.

Q. Club?

A. I don't recall.

Q. Do you recall any other men's magazines being on sale there? I mean, you know there were other men's magazines being sold?

Steven Nemeckay by Mr. Fahringer

A. I couldn't recall by title.

Q. You couldn't recall by title?

A. No, sir.

Q. Now, do you have a reporting procedure that you follow concerning investigations when you purchase a magazine?

A. Yes, sir.

Q. All right. Do you have any reports that you filed in connection with this investigation?

A. Yes, sir.

Q. And are those reports here in court?

A. No, sir.

Q. Are they easily available?

A. Yes, sir.

MR. FAHRINGER: Okay, We subpoenaed them, and I thought they would be produced in court, Judge.

MR. TAYLOR: I have two such reports, Your Honor.

MR. FAHRINGER: Your Honor, may we see those under Rule 16?

MR. TAYLOR: I would object. That is a work project. I wouldn't object to the specific report, but to hand over the whole report—

THE COURT: Let me see what the subpoena says.

MR. FAHRINGER: I have the — Judge, this would be the one—

THE COURT: All right. What is the situation, Mr. Taylor?

MR. TAYLOR: Okay. Certainly under Rule 16 work products are specifically excluded. Statements of witnesses, or memorandums written by them may be reviewed and examined after testifying to decide whether or not there are any inconsistencies.

This is a police report regarding this case. This police report — it is not their privilege to subpoena this. I think the officer can have his report to read from it, and for specific questions asked, to refresh his recollection or his memory with it; and therefore, after his testimony if the court was to review his report, and there were any inconsistencies, we would have no objections then.

MR. FAHRINGER: Judge, my application to the court is this: The inquiry here goes to the prosecution itself. If there's anything in these reports that relates to this, it seems to me under subpoena power and a matter of information which we're bringing to your attention, supports our claim, and it should be available to us.

The other one is, of course, that we have a witness that is testifying, and if there is anything in the reports that are inconsistent with what he said on the witness stand, I think we would be entitled to it.

What I would like to suggest, Your Honor, if there is anything in the reports that is in anyway strategic or tactical, I don't see any harm in my seeing them—

MR. TAYLOR: Well, it is just practice. We don't like to agree that police reports are not privileged, and certainly they can't get reports one way and if that's not allowed, they get it another way—

MR. CAMBRIA: It seems to me that first of all, the remedy would have been a motion to quash the subpoena and in addition to that, there are also situations where material not usually — frankly, Grand Jury minutes.

Steven Nemeckay by Mr. Fahringer

This is an instruction hearing, and if we had the witness on the stand testifying before the Grand Jury and in the normal course of events, we wouldn't get the Grand Jury minutes. Because he is testifying, and we're cross-examining him, we're entitled to Grand Jury minutes even though in the normal course of events we wouldn't get them—

MR. FAHRINGER: I anticipated that there would be resistance—

MR. TAYLOR: I don't think so. Not that there is anything to hide. It is just that the police reports, we prefer to have them remain privileged wherever possible. I don't like to deviate from that.

THE COURT: Obviously, the summary of the activities taken in the Hustler magazine is privileged communications. It is evidence that you were going to — which can be discoverable, but which the court will not permit that to be used.

MR. TAYLOR: Certainly things like dates and times and facts not—

THE COURT: If they don't ask you, you are entitled to reserve that until you are asked.

MR. TAYLOR: We already gave most of the information.

THE COURT: All right. Fine. Let them have it then. The court will rule on the police report. As of now it is not permitted, but we'll see if there is any problem during the testimony.

MR. TAYLOR: That's Officer Nemeckay's report on July 2nd, 1976.

BY MR. FAHRINGER:

Q. Officer, concerning your activities that you described so far in going into the premises and purchasing the magazine, did you then bring them back and display those magazines to the prosecutor, Mr. Taylor?

A. Well, he was present when we purchased the July edition.

Q. Mr. Taylor was present when you purchased that?

A. Yes, sir.

Q. And what about the August issue?

A. I went out and purchased it, and presented it to him.

Q. Now, did you have two separate discussions; I presume you did, on the July issue and on the August issue, or were they discussed together?

A. No, those were separate discussions.

Q. In connection with those discussions, did you take the call, originally, the first complaint concerning the political cartoon?

A. The first complaint was from Captain Delau, my immediate supervisor, and he had the July edition which the complaint came to him relevant to the contents being of sexual activity, and possibly falling within our enforcement.

Q. Well, I'm specifically asking you about the cartoon. I understand from Mr. Taylor that the original complaint was that someone had complained about the cartoon?

A. Yes.

Q. That three of these figures were having intercourse with the Statue of Liberty?

A. Yes, sir. That was directed to Captain Delau. We received

several anonymous complaints over the phone relative to the publication.

Q. Now, did they relate to the cartoon also?

A. They related to the publication itself.

Q. Specifically, like what?

A. Well, that's quite awhile back. I will have to say, that the magazine in general.

Q. Was that included in your report, the complaints?

A. Yes, sir.

Q. And that's the report that the judge has?

A. I don't recall what was in that report there.

Q. Is there another report of the complaints?

A. No, sir. That probably would fall within the July report I had.

Q. So that the report might tell us little more specifically about the complaints.

How many complaints were there?

A. If I can remember, maybe three or four.

Q. All right. Did they come several days apart, or all in one day or separated over a period of time?

A. Over several days after the edition came out.

THE COURT: To set the record straight, I'll quote part of the report that pertains to the complaint and pertains to what your questions are:

"The following action has been taken to date regarding the edition of Hustler magazine. The July issue was brought to the attention of Captain Delau, and since we have received complaints on this publication."

So mention of any complaint, or how this investigation was begun.

MR. FAHRINGER:

Q. Now, when you talked to Mr. Taylor about the July issue with the political cartoons in it, incidentally, you have some written guidelines, don't you, that have been in existence for some, what, four years or so?

A. They're not written, no. That's guidelines that were agreed to by the law department and the prosecutor's office at the — since this unit was initiated.

Q. You've never had any written guidelines?

A. No, sir.

Q. All right. So that there was never any memo or letter or anything of any kind?

A. No. It was an understanding among ourselves when we initiated this unit.

Q. What were those guidelines?

A. It was sexual activity. General genital, male to male, female to female, human and animal or oral genital, anal genital, oral-anal, lesbianism, masturbation-ejaculation, perversion, various depictions of human genitalia, various — bestiality. Those were our basic guidelines.

Q. All right. Now, and that involved explicitness, didn't it, in terms of—

A. Well, it was contact, penetration.

Q. Now, were those guidelines changed at all—

A. No, sir.

Q. —when Mr. Taylor took over?

A. No, sir.

Q. Now, going back to the discussions on Hustler magazine. The July and August issues.

Were those discussions, and the basis for prosecuting these two magazines, reduced to writing by you at all; the reason why it was being prosecuted?

A. The particular Hustler edition was presented to several other municipal court judges—

Q. I'm sorry, Officer. You misunderstood me.

The reason — all I'm asking you was if your report — did you put down any reasons at all on any of your reports why Hustler magazine was being prosecuted, as to what parts were most offen[illegible]e or anything of that sort?

A. This was what the discussion of several judges—

Q. I understood that. I'm only asking about the report. Would that be contained in the report that was before the judges, now, as to why it was being prosecuted or—

A. Yes. The determination had been made by several judges.

Q. All right. And was anything mentioned in the report that had to do with the portions of the magazine that were offensive?

A. Yes. I believe there was some sections, that's in the July edition, which were spelled out as being more offensive than other sections.

Q. Okay. And may I ask you this: Were one of the reasons for prosecuting the July issue, the cartoon that showed three prominent political officials having intercourse with the Statue of Liberty?

A. No, sir. The magazines were viewed from cover to cover and taken as a whole to be obscene.

Q. Did that play a part in it at all, the political cartoon?

A. It was in the magazine.

Q. So it didn't play a part in the prosecution?

A. There was masturbation and ejaculation—

Q. I'm talking about the cartoon?

A. In the cartoon, yes.

Q. So that was part of the basis of the prosecution?

A. One of the guidelines, yes, sir.

MR. FAHRINGER: Judge, may I just, for the record, renew my demand for the record as for the reason why the magazine was prosecuted as going to the heart of this issue. I think to that extent it is relevant now without getting into other parts of the report—

MR. TAYLOR: Judge, I think maybe you should review it to see if there are any inconsistencies that may be pointed out as to the officer remembering which parts he put in his report; and if you don't feel so, and the officer can't remember the report—

THE COURT: The court is still going to deny the report to the defense counsel on the basis that it is a police report and is confidential, and that based upon the testimony being given by the officer, it is not inconsistent with the statement taken here.

MR. CAMBRIA: May I just make one comment, Your Honor?

I'd like to make sure it is understood that we're joining into each other's motions with regard to the Rule 16 question. That even indicates that counsel would have a right to participate in determining whether or not there was inconsistencies, so the record is clear—

THE COURT: You bring up a question that you are joining in motions. Just to straighten it out for the record, we have Bernard Berkman listed as the attorney of record. It is my understanding that Bernard Berkman is not the attorney of record. Is that correct for the purposes of the trial?

MR. FAHRINGER: That's right.

THE COURT: All right. For the purposes of the trial, you represent individuals, or both of you represent the same party or what is the situation?

MR. FAHRINGER: Well, Your Honor, I'm not completely sure, but let me tell you what I think the situation is.

I represent Mr. Flynt—

THE COURT: Which Mr. Flynt?

MR. FAHRINGER: Larry Flynt. Your Honor, Mr. Cambria has represented James Flynt, and I would guess the position here today is that he also represents Althea Flynt.

Now, Your Honor, if there were to be a trial, and we would try them one at a time, we might adjust that—

THE COURT: I understand that. Just as a matter of record so we are not having Mr. Berkman listed here as the attorney of record, and being unfair to him, because it is my understanding he is not the attorney of record—

MR. FAHRINGER: Of counsel—

THE COURT: He has a very limited capacity in this lawsuit.

So the attorneys of record are Mr. Fahringer and Mr. Cambria.

MR. FAHRINGER: With your Honor's permission—

THE COURT: No, no problem. He indicated also that he joined in the objection—

MR. FAHRINGER: I think now, for the record, to make it clear, wherever we urge the point, it is for all of us—

THE COURT: I understand. The court understands that.

MR. FAHRINGER: Fine. Okay.

MR. TAYLOR: Let me make another suggestion. You can ask specific questions of the officer as to what he put in the report, and if the officer can't remember, certainly he is allowed to see his own report for the purposes of recollection.

MR. FAHRINGER: Judge, the only other thing I was going to ask is this — and I welcome that if that helps him refresh his recollection. I was only going to ask if we might have the report marked so just to preserve it as a court exhibit in terms of — in the event—

MR. TAYLOR: Judge, I was going to suggest that I make a copy and provide it to the court so it doesn't get filed with the file—

MR. FAHRINGER: They suggested that procedure in this case, as Your Honor knows, so documents have some way of being identified.

THE COURT: The report we're referring to is the report by Steven Nemeckay to John Schmidt, Sergeant, dated July 2nd, 1976, pertaining to the investigation to the events surrounding the investigation of Hustler

magazine, and the contents of Hustler magazine, and the purchase of said magazine.

MR. TAYLOR: The only thing — we've got some writing on the back that were mine.

BY MR. FAHRINGER:

Q. Now, Officer Nemeckay, just so we're certain, are there any other written reports of any kind relating to this prosecution, the prosecution of the July and August issues of Hustler. Again, Jimmy, Larry and Althea Flynt that have not been produced here today?

A. That would be the arrest report that was made by Patrolman John McNamara.

Q. Would that—

A. That was made out on the 17th when they came up here to Cleveland and were booked in the court, under the first appearance.

Q. And what would that just contain?

A. It would just contain the facts they were here.

Q. Arresting and booking—

A. Appeared in court, and the case was continued.

Q. Anything else you can—

A. No, that would be it.

Q. Now, what about yours? Do you make any notes at all on these investigations, notebook, like where you purchase the magazine, or do you make any notes when you make an inspection—

A. The entries were made here, and the entries were made on the envelope. This was all secured in our evidence locker. The

entries were made in my initial report. Notes were taken at the scene at the time, and the other facts are just circumstantial required in the note-taking.

Q. Now, I might say in that regard these have been given to us. Would you just indicate so we don't have any trouble — what's the indication on the gray bag?

A. This is 10:50 A.M., Friday, 7/2/76, Sam Klein Cigar Company, 1834 East Sixth. Marvin Goldstein was the manager, and it indicates this publication was from George Klein News, 1717 East 30th.

Q. You had it marked pandering obscenity—

A. Yes.

Q. That was just the charge. Can I ask you to read—

A. This one here is 1:05 P.M., 7/4/76, on Wednesday, at 1930 East Sixth Street. Erieview News. Jack Antis, the owner, personally made the sale to me, and the telephone is 771-0240. That he afforded me to contact him by phone.

Q. All right. Thank you.

A. Yes, sir.

MR. FAHRINGER: I don't think I have any other questions.

MR. CAMBRIA: Just a couple of brief questions, Your Honor.

MR. TAYLOR: Judge, before we begin, may I ask your bailiff to make a copy of the report so that you can compare it to make sure it is the same ones. This one has my own writing and notes on the back. That way you could have a true copy. May we do that?

THE COURT: Go ahead.

MR. TAYLOR: If not, I can copy it at the law department when we're done.

MR. FAHRINGER: I don't mind you doing that later.

THE COURT: Okay, Mr. Cambria.

MR. CAMBRIA: Thank you, Your Honor.

EXAMINATION OF STEVEN NEMECKAY

BY MR. CAMBRIA:

Q. Officer, the bookstores, and I believe you indicated that you visited six bookstores in the City, inner city area?

A. In the immediate area, yes, sir.

Q. And any of these bookstores, I noticed that you named some of your guidelines and so on. Did any of these bookstores have any magazines which showed consummated sexual activity, intercourse, anything of those things you listed?

A. At that particular time, I was looking at the July edition of Hustler magazine.

Q. You have been in the stores before?

A. All the stores in the City of Cleveland.

Q. All right. You have been in all those stores on a regular basis, haven't you; is that your job?

A. Not a regular basis. We have certain areas that deal with hard-core obscenity. There are violations of law, and others do not so—

Q. Let me—

A. —periodically, we will check them.

Steven Nemeckay by Mr. Cambria

Q. All right. These East Sixth Street stores, have you been in these stores prior to the day you went there to purchase Hustler, these six stores, had you been in these stores?

A. What is the time period involved?

Q. Ever?

A. Three months, four, yes—

Q. Ever?

A. Yes.

Q. And have you been in there as part — in your official capacity as being with a salacious literature squad, or whatever you call it here?

A. Yes, sir.

Q. When you were in there, did you have an occasion to examine any of the books in those bookstores?

A. At that time, yes, sir.

Q. All right. When you examined these books, did you find any that had any consummated sexual acts?

A. Not to my knowledge. If I did, they would have been brought in as evidence.

Q. I'm not talking about the day you went in there for Hustler, I'm talking about any other time?

A. Prior to that, no, sir, never found—

Q. In all of those six stores?

A. Yes, sir.

Q. Could you just name the other four stores, so we could have those on the record. Aside from the two that you already—

A. Well, we checked the bookstand at Ninth and Euclid. We checked the bookstore at Third and Superior. We checked the bookstore at Sixth and Euclid, and at the Square.

Q. All right—

THE COURT: Just one second, Mr. Cambria.

Just for the gentlemen, they are from out of town. You indicated you checked the bookstore. You are referring to newstands—

THE WITNESS: These are newsstands—

THE COURT: You checked newsstands as differentiated from bookstores?

THE WITNESS: Yes.

MR FAHRINGER: We appreciate that, Your Honor.

MR. CAMBRIA: Thank you, Judge.

BY MR. CAMBRIA:

Q. When you went into these places, is there a section or any area where the so-called men's magazines or books are located?

A. They have all magazines, yes, sir.

Q. Is there a particular section where there is a concentration of, like, Penthouse, Playboy, Oui and a bunch of these others?

A. Not that I—

Q. You mean they're all scattered around?

A. Yes, sir.

Q. But those books are contained, or those magazines are contained in the stores?

A. Yes, they're displayed.

Q. And I take it that they are displayed no differently than the Hustler magazine was displayed that you purchased.

They're all up on a rack somewhere, or something like that?

A. Well, the Hustler was the only one that had a cover on it.

Q. Yes, aside from that. Aside from the cover. They were all lined up on the rack facing the public, is that correct?

A. Most of them do, yes, sir.

Q. Okay. Now, on the day you went in and purchased Hustler, did you just walk right up to the stand and grab Hustler and pay for it and walk out; or do you remember did you leaf through any of the other books or magazines that were there?

A. We had reviewed this original Hustler magazine. Therefore we wanted to see if it was being sold in the City of Cleveland.

Q. Is that the answer to my question that you didn't review any other magazines; you just went right in and purchased Hustler?

A. I was looking for Hustler, at that time, yes, sir.

Q. Okay. So you went in and grabbed Hustler, and you didn't look at any other magazines. You purchased it, and you walked out, is that correct?

A. No, we had a discussion with the manager.

Q. Okay. Did you purchase any other magazines?

A. No.

Q. Did you look at any other magazines?

A. No, sir.

Steven Nemeckay by Mr. Cambria

Q. All right. Now, did you ever, at anytime, instruct any of the retailers or wholesalers or whomever, not to sell Hustler magazine, or that it would be a good idea not to sell Hustler magazine or something like that, you or anyone from your department, to your knowledge?

A. After the seizure of this particular July edition, we had discussions on it.

Q. Who did you go see?

A. Sam Klein at the Sam Klein Cigar Company, and Mr. Antis at Erieview.

Q. Did you tell them not to sell it; is that what you told them?

A. No. No. I told them the magazine was to be taken for judicial determination, and if it was deemed to be obscene, that the sale of it would be a violation.

Q. Didn't you just say that you went there and talked to them after this prosecution began, isn't that what you did?

A. I talked to them at the time I purchased them.

Q. All right. Did you ever contact them after you purchased, or after the time the magazine was prosecuted, and direct them or indicate to them in some way or another that they shouldn't sell the magazine—

A. No, sir.

Q. —Hustler? Never?

A. No, sir.

Q. Did you take any other magazines, and I'm not just limiting this to the day you purchased Hustler.

Have you taken Playboy or Penthouse, Oui, Club, Swank, Genesis, Gallery or any of those magazines for the purposes of

prosecution; have you ever picked any of those up and started building a case prior to the time that Hustler—

A. Myself, no.

Q. All right. Thank you.

MR. CAMBRIA: No further questions.

MR. TAYLOR: Now, Judge, it might aid the court so I would be willing to read from the police report. You have the original that I handed to you, and I have a copy. I would be willing to read the parts up here relating to what the officer put down about the contents. If that would help, I think that would maintain the confidentiality of the rest of the report.

MR. FAHRINGER: I would appreciate that, Your Honor.

THE COURT: Well, I'll tell you, there would be no problem in my opinion if they received a copy up until they were — all right. Do you want to read the one, two, three, fourth paragraph?

MR. TAYLOR: Well, including the third paragraph.

THE COURT: All right. No problem, if you wish—

MR. TAYLOR: Third, fourth and fifth—

THE COURT: All right. No problem if you wish to make a copy of this and just cut off the bottom part. There would be no problem instead of—

MR. CAMBRIA: Thank you.

MR. FAHRINGER: Thank you.

THE COURT: Cut it right off above where it says Mr. Gold.

MR. TAYLOR: How about this—

THE COURT: If you are permitting that, that is your decision. If you're permitting that to go in there.

MR. CAMBRIA: Your Honor, there is just one thing so the record is clear. We'd like to ask the prosecution where we can find the particular Screw magazines that he referred to in the course of the testimony. At least the issue number or something that would be indicated in the file regarding the issue number so we could produce those.

THE COURT: I assume Smut was that the—

MR. CAMBRIA: Screw or—

THE COURT: Smut. Just identify those. Then we would like to make them part of the record. I think that we can procure copies of the issue.

MR. TAYLOR: Okay.

THE COURT: Just give it to the defense, and that will solve that question.

MR. TAYLOR: Okay.

THE COURT: Any questions, Mr. Taylor?

MR. TAYLOR: Mr. Cambria, I took back the report that I had. It has my notes on the back. I gave the Judge a duplicate copy of it.

MR. CAMBRIA: Fine.

MR. TAYLOR: Nothing further, Judge.

MR. FAHRINGER: No questions, Your Honor.

THE COURT: All right. Anything further, Mr. Cambria?

MR. CAMBRIA: Nothing.

THE COURT: You may step down.

MR. FAHRINGER: I think that's all, Your Honor.

THE COURT: All right. I think we have, just for the record, we have made a determination based upon, I think, a motion. The six motions for separate trials, four and six.

If there is to be any trials that the court will grant, separate trials, there need be no — we'll not have any arguments. I don't mean adversely — arguments presented by the defendant. The court will grant separate trials. If there are in fact trials, there will be separate trials; and can we establish a date for trial, if we are going to have any, or would you prefer not to—

MR. FAHRINGER: Judge, if you don't mind, as a matter of fact, I must tell you that I'm going to go back to Wichita—

THE COURT: I don't mean tomorrow.

MR. FAHRINGER: I mean, I was wondering if we could hold that. I'm sure I will be able to accommodate you promptly if there is going to be a trial.

I want, if you don't mind today, at least to fix a date until we get our schedule—

THE COURT: In looking over the schedule, I was thinking of April 21.

MR. FAHRINGER: That's when the trial will be on. The month of April, Judge.

THE COURT: All right. For the sake of our own record, the court will continue this case just for a month.

MR. FAHRINGER: That would be fine.

Closing Remarks

THE COURT: At which time the court will make a ruling upon the motion. Just as a preliminary, I don't know if the court made a preliminary ruling, but the court is prepared to make some preliminary ruling. Mr. Cambria.

MR. CAMBRIA: The only thing I was going to say, Your Honor, if you are going to continue it for a month, perhaps we might be able to acquire this transcript and then submit our brief within the next two or three weeks.

THE COURT: Your discretion.

MR. CAMBRIA: Thank you.

THE COURT: All right. I think the court has already indicated that your challenge on the constitutionality of the section of the Revised Code, that the court, based upon decisions that have been handed down in our Court of Appeals and other pandering obscenity cases, something that defense counsel don't agree with the court. The court feels that the Court of Appeals has made a determination that these sections are in compliance with the requirements of the guidelines of Miller, and together with the Miller guidelines, I believe the Burgun and the Hamling court, it is this court's opinion that given to the jury together with these guidelines of Miller, that that particular section would be constitutional. Therefore, the challenge of the constitutionality based on overbroad and vagueness would be overruled at this particular time.

I would assume you have received the bill of particulars. I have not seen them, and I don't know if you, at this time, feel that we have—

MR. TAYLOR: Judge, don't you have a copy?

THE COURT: Do I?

MR. TAYLOR: Yes, I gave you a memorandum in support, and it has a copy on it.

THE COURT: When was that given to the defendants?

MR. TAYLOR: January 28. The bill of particulars was given to them — sent to them on the 20th of January.

THE COURT: All right. There was a challenge by the defendants on the question of duplicity, did we resolve that matter?

MR. CAMBRIA: No, Your Honor. The position that we have is that the bill of particulars cannot take the place of a sworn complaint and sworn allegations in the complaint. It can't be used to supplement it, and I believe, the authority that we cited in our earlier brief substantiates our position.

THE COURT: Then the court will hold that in abeyance together and look over the bill of particulars to see where we stand—

MR. TAYLOR: Just so you'll have it. Here is a copy of the memorandum, and the bill of particulars is attached on the back. I sent them the—

THE COURT: I'm sorry. I have them.

MR. TAYLOR: I also have the list of witnesses I sent them and all the articles that I gave them in discovery today which I would like the court to have a copy of.

THE COURT: Now, as far as the challenge as to the — I think it was point five. Constitutionally protected and not being obscene under the law.

The court overrules that motion.

So we have left, I believe, your motion on duplicity.

Closing Remarks

MR. CAMBRIA: Sufficiency, duplicity—

THE COURT: Sufficiency is — that's the challenge of constitutionality—

MR. CAMBRIA: No, Your Honor, we have a sufficiency of the complaint, itself, because it lacked any factual specifications.

THE COURT: All right. The court—

MR. CAMBRIA: Then the duplicity and the disjunctive argument that we made, all of those are in that—

THE COURT: All right. The court will hold in abeyance upon the duplicity and upon the question that we discussed, discriminatory prosecution.

MR. TAYLOR: Your Honor, I would—

THE COURT: The court would hope that we would continue this case until, just as a matter of record, not that anybody need be present, so that our clerk's office does not go crazy, we will continue the case until March 31. Would that give you—

MR. FAHRINGER: Yes.

THE COURT: —give you sufficient time to file?

MR. FAHRINGER: Yes.

THE COURT: By March 31, you should have everything possible, and if the court is not prepared to make a decision at that time, we will make one in the — continue for a couple of weeks and make a decision then.

MR. FAHRINGER: Thank you.

MR. CAMBRIA: Thanks, Judge.

Closing Remarks

MR. TAYLOR: Let me make the offer as far as the complaint goes. I would have no objection to amending the complaint to eliminate several of the alternatives which are contained in the complaint as written. All the complaints are worded the same, and they will all be amended the same.

THE COURT: Well, why don't we do this. Why don't you submit to the defendants a copy of the proposed amended complaint, and they'll address themselves to it at the time of filing the brief—

MR. FAHRINGER: I will bring it for the court.

THE COURT: All right. Thank you.

MR. FAHRINGER: Thank you, Judge.

CERTIFICATE

I, Benjamin F. Watkins, Jr., do hereby certify that as such Reporter I took down in Stenotypy all of the proceedings had in said Cleveland Municipal Court in the above-entitled cause; that I have transcribed my said Stenotypy notes into typewritten form as appears in the foregoing Transcript of Proceedings; that said transcript is a complete form of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.

/s/ BENJAMIN F. WATKINS, JR.,
Benjamin F. Watkins, Jr., Notary Public
within and for the State of Ohio

My commission expires on August 26, 1981.